TABLE OF CONTENTS

ANSWER: PAGE

History of the Case 2

Argument 7

Answer to Petitioner's Contention that a .38 Calibre Bullet may have caused the death of Officer Ingling 51

Due Process of Law under the 14th Amendment to the Constitution of the United States 52

Conclusion 54

Footnote 12 57

TABLE OF CASES CITED

Commonwealth vs. Almeida, 362 Pa. 596 (1949) 17
Commonwealth vs. Byron, 357 Pa. 181 (1947) 8
Commonwealth vs. William Chavis, alias Wilburn Chambers, 357 Pa. 158 (1947) 52
Commonwealth vs. Kaiser, 184 Pa. 493 (1898) 55
Commonwealth vs. Lawrence, 282 Pa. 128 (1925) 55
Commonwealth vs. Mellor, 294 Pa. 339 (1928) 56
Commonwealth vs. Moyer, 357 Pa. 181 (1947) 8
Commonwealth vs. Parker, 294 Pa. 144, 154 (1928) 56
Commonwealth vs. Sterling, 314 Pa. 76 (1934) 56

Frank vs. Magnum, 237 U. S. 309, 326, 35 S. Ct. 582, 59 L. ed. 969 (1915) 53
Franklin vs. South Carolina, 218 U. S. 161 (1910) 54

Garland vs. Washington, 232 U. S. 642 (1914) 53
Krug, 79 Fed. 308 (1897) 53

Maxwell vs. Dow, 176 U. S. 581 (1900) 53

PAGE

Pico vs. U. S., 228 U. S. 225 (1913) 53

Straudder vs. West Virginia, 100 U. S. 303 (1879) 52

Walker vs. Sauvinet, 92 U. S. 90 (1875) 52

CODE CITED

Criminal Code of the Commonwealth of Pennsylvania Enacted June 24, 1939, P. L. 872, Sec. 701, 18 P. S. 4701 50

TABLE OF CONTENTS OF APPENDIX

EXHIBIT A. TESTIMONY OF DR. WILLIAM S. WADSWORTH IN RE COMMONWEALTH VS. DAVID ALMEIDA, JUNE 3, 1948 AS OF MARCH SESSIONS 1947 NO. 1282, BEFORE JUDGE VINCENT A. CARROLL AND JURY:

	D.	C.
Dr. William S. Wadsworth	1a	2a

EXHIBIT B. TESTIMONY OF DR. WILLIAM S. WADSWORTH IN RE COMMONWEALTH VS. JAMES SMITH, JUNE 16, 1948 AS OF MARCH SESSIONS 1947, NO. 1282, BEFORE JUDGE BYRON A. MILNER AND JURY:

	D.	C.
William S. Wadsworth	7a	8a

EXHIBIT C. TESTIMONY OF LIEUTENANT GEORGE R. SPANGLER IN RE COMMONWEALTH VS. JAMES SMITH, JUNE 17, 18, 1948, AS OF MARCH SESSIONS 1947, NO. 1282, BEFORE JUDGE BYRON A. MILNER AND JURY:

	D.	C.	RE-D.
George R. Spangler	13a	26a	45a

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1949.

No.

DAVID ALMEIDA,

Petitioner,

VS.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ANSWER OF THE DISTRICT ATTORNEY TO PETITION AND BRIEF FOR APPLICATION FOR CERTIORARI.

To the Honorable, the Justices of the Supreme Court of the United States:

The Answer of the Commonwealth of Pennsylvania, Respondent, respectfully represents:

This is an Answer on behalf of Respondent to Petition of David Almeida for Writ of Certiorari to review the Decision of the Supreme Court of Pennsylvania as of January Term, 1949, No. 78, affirming the judgment and Sentence of the Court of Quarter Sessions of the County of Philadelphia, as of March Sessions, 1947, No. 1282.

HISTORY OF THE CASE.

About five o'clock p. m. on the afternoon of January 30, 1947, this petitioner, David Almeida, James Francis Smith and Edward James Hough, stole a "blue" coupe automobile, the property of the City of Philadelphia, with the notation printed upon its side "City of Philadelphia, Division of Housing and Sanitation, No. 10," from a garage at 673 North 41st Street. They then proceeded therein to the Acme Market, at 1934 Fairmount Avenue, in the City and County of Philadelphia, Pennsylvania, and all being armed, Smith remained at the wheel. Almeida with a "large" pistol and Hough with a .45 automatic entered the store and perpetrated a robbery. They fired shots in the store, in order to consummate the robbery and to effect their escape, and ran with the loot to the "blue" coupe automobile. Patrolman Cecil Ingling, off duty at the time, and out of uniform, had just drawn up in his automobile with his wife Helen, and his children, a daughter Jean, fourteen years of age, and his son Leon, sixteen years of age, for the purpose of making some purchases. Shortly thereafter, a hue and cry was in progress. Several shots were fired, which came from the automobile of the robbers, as a result, Patrolman Ingling was killed a few feet away from this car, used by these defendants for the purpose of escape. Mrs. Ingling and her two children were in their automobile, and they testified that the shot that killed their husband and father came from the "blue" car in which the three defendants were passengers. Their evidence was that James Francis Smith, a co-defendant, fired the shot, but Edward Hough, the other co-defendant, after pleading guilty, testified that the fatal bullet came from the automobile in which he and his co-defendants were passengers and that this petitioner, David Almeida, fired that shot.

Smith, Hough and Almeida succeeded in fleeing in their car and were pursued by the police. Edward Hough was apprehended after he had fallen or had been pushed out of the automobile. The other two escaped and were arrested a year later in the Middle West for participating in a hold-up and robbery of the Peoples National Bank of New Orleans, Louisiana, wherein $115,000 was taken. They were tried in the Federal Court in that jurisdiction, pleaded guilty and were sentenced to thirty-five years imprisonment. These facts, however, were not offered in evidence at the trial of Almeida.

The Commonwealth called thirty-one persons, many of whom were eye witnesses, who identified the petitioner as being an active participant in the robbery, and that he, Almeida, had fired his pistol in the Acme Market during the consummation thereof. There was but one eye witness called on behalf of the petitioner, whose testimony was without value and was limited to a statement that she heard someone in the crowd of about two hundred persons make a statement, which the petitioner's counsel attempted to prove came from Mrs. Ingling. The petitioner did not take the stand and did not offer any other evidence than that of the one witness.

The Commonwealth's evidence further proved that about the noon hour on the day of this occurrence, Almeida, this petitioner, went to the Hough home at 5101 Arch Street, Philadelphia, remained there a short while and then went to Kenny's Taproom with him. They were known in this saloon, in the vicinity of the home of James Francis Smith, a co-defendant, which was testified to by the bartender and the proprietor. Almeida, this petitioner, and Hough had been in the saloon a short while before being joined by Smith, who thereupon left Almeida and Hough for about fifteen minutes. He, Smith, returned for a short time and left again. He then later returned and all three boarded a trolley car to the central part of Philadelphia. They visited several other saloons or taprooms and in a place at 22nd and

Fitzwater Streets, Smith distributed a .45 automatic, Army-type revolver, to Hough, and a "large" pistol to Almeida, which Hough described as looking like a "horse pistol," and he, Smith, had a smaller one than Almeida.

From this taproom at 22nd and Fitzwater Streets, petitioner, Smith and Hough proceeded to the vicinity of 51st and Haverford Avenue, West Philadelphia, and a suggestion was made that a car be obtained from some garage. Hough mentioned a garage at 673 North 41st Street, to which all three proceeded and entered. They drew revolvers and the attendant was commanded to produce keys for the cars in the garage. They stole a car described throughout the testimony as a "blue" car. Leaving the garage, with Smith at the wheel, they drove over Spring Garden Street Bridge to the vicinity of 20th Street and Fairmount Avenue. At this point, Smith said, "This looks like a good place." Whereupon, he parked the car at an angle against the curb in front of the Acme Market at 1934 Fairmount Avenue. Petitioner and Hough alighted and Smith remained at the wheel. Before entering the Market, Almeida and Hough stood in full view before the window and were identified by one of the cashiers in the store, as well as by the wife, son and daughter of Patrolman Ingling, whose car was parked along the curb. Outside the store, Hough was seen putting on a pair of black glasses, and Almeida tying a handkerchief around the lower part of his face. They then entered with drawn guns. Hough immediately went to one of the cash registers and emptied it, telling the cashier it was a hold-up. He took all the money and the cashier's wallet, which contained three dollars. He placed the money in his pocket and went to another register and took all the money it contained. Meanwhile, petitioner, with his gun in his hand, approached the manager. The manager turned around to face petitioner, looked into Almeida's gun and yelled, "Hold-up," grabbing two cans of corn. Whereupon, this petitioner, Almeida, shouted, "I'll get you, you son-of-a-bitch," and started firing.

The manager said Almeida's gun looked like a long one—much longer than the one displayed in court and identified by Hough as his gun. Petitioner, Almeida, fired at least one shot either at the manager or over his head at the ceiling, and as he, Almeida, left the store, he fired another shot. The money taken, and belonging to the Acme Market, was $259, together with the three dollars belonging to the cashier. Further testimony produced indicated that Almeida, petitioner, grabbed some bills from a one-armed man, whom he cursed and who was leaving the store in the path of Hough and Almeida.

Upon leaving the Market, they went to the "blue" car, which Smith was backing out of position against the curb. Patrolman Ingling had returned to his car by this time, and there were cries of "Hold-up," which brought three policemen and two police cars to the scene. These policemen heard firing, but were uncertain as to what was happening. When Officer Waters and Officer Fox, in one of the police cars (Waters driving) came almost abreast of the "blue" car, which was backing out, Hough fired a shot in their direction, at a distance of about thirty feet. Whereupon, Waters fired a shot at him. Officer Ingling had already been shot before the police commenced firing their guns, and his body was on the pavement. Hough further testified that he, Hough, was in a crouching position and petitioner, Almeida, fired the shot which penetrated the brain of Officer Ingling, the bullet entering the right side of Ingling's head above his right ear, near the edge of the frontal and parietal bone, going through his brain, destroying it, passing out above the left eye. This bullet was not recovered.

A preponderance of the Commonwealth's testimony indicated that Ingling was never in the line of fire of the police officers involved, as he was lying on the pavement when the firing by the police officers commenced, and that he had been shot before the police started to fire. At least four witnesses, i. e., the three Inglings and Hough, testified

that the bullet that killed Officer Ingling came from the "blue" car in which Smith, Hough and this petitioner, Almeida, were passengers.

When the "blue" car left the curb, Hough, Smith and Almeida were riding in it. They were pursued by two red cars, and during the pursuit one of the men in the "blue" car fired at the pursuing car. After a chase of several blocks, Hough was either thrown or fell out and was captured by the police. A .45 calibre Army automatic was handed to the police by a bystander, which Hough identified as the pistol he used at the time of the robbery. At the trial of this petitioner, Hough testified for the Commonwealth and identified the pistol he had used, which was recovered by the police immediately before or following Hough's arrest at or about the scene of the robbery. A .22 calibre revolver, fully loaded, was also recovered in the abandoned car about two hours after Hough's arrest. The pistol described as having been in the hands of this petitioner, was never recovered.

Assistant District Attorney Ephraim Lipschutz, Esq., who prosecuted these cases, died in May 1949, and the Commonwealth does not know if Mr. Lipschutz ever knew that the police had possession of a .38 calibre bullet, found upon the street, with something that appeared like blood thereon. In the melee, however, James Francis Smith was also wounded, and what this bullet had to do with these crimes is only open to conjecture. Testimony was offered concerning it at the trial of James Francis Smith by Lt. George R. Spangler, the ballistic expert of the Philadelphia Police Bureau, and is found at page 321 of the record in the Smith trial. (Appendix, Exhibit "C")

ARGUMENT.

The respondent emphatically denies that there was any "suppression" of material or relevant testimony at the time of the trial of this petitioner. The basis of that allegation by petitioner is the finding of this .38 calibre bullet on the street and its non-production at petitioner's trial. Under the law of the Commonwealth of Pennsylvania, defendants in a homicide case are entitled to a severance and to separate trials.

For what reason the jury in the petitioner's case found a verdict of guilty of murder in the first degree and fixed the penalty at death and why another jury in the Smith case found the murder to be first degree and fixed the penalty at life imprisonment, is likewise only open to conjecture. The law of Pennsylvania places the responsibility for the fixing of the penalty, after a finding of guilt of murder in the first degree, upon the jury. Dissatisfaction with an adverse decision has never been a reason for a reversal or for a new trial.

Counsel for the petitioner are in error when they say, in their petition for a writ of certiorari, page 10-11, that "The judgment rendered by the Supreme Court of Pennsylvania on October 4, 1949, is merely an exposition of the 'felony-murder' rule, which in itself, as applied to this petitioner, is an expost facto and grossly unfair formulation. Before the decision in this murder case, it would have been error for the Trial Court to charge, as it did, that petitioner would be guilty 'even if a shot was fired by Mrs. Ingling.' But to ensnare this alleged 'cop-killer,' the decision stretches to its outermost limits what is to begin with a harsh rule of law." Respondent submits that on the contrary it is an

eminently fair and proper statement of the law, inures to the benefit of law-abiding citizens and promotes the safety and well-being of the community as a whole. Perhaps counsel term this "an expost facto and grossly unfair formulation" because after the perpetration of this robbery and murder on January 30, 1947, and before the apprehension and trial of the petitioner, Almeida, and James Francis Smith, Mr. Chief Justice Maxey of the Supreme Court of Pennsylvania, decided on June 1, 1947, which decision was unanimously concurred in by the Justices of the Supreme Court, (Mr. Justice Jones not sitting) the cases of the Commonwealth versus Moyer and Byron, 357 Pa. 181. There, on page 188, the Chief Justice stated:

> "This assignment of error poses the question whether or not these defendants can legally be convicted of murder if the bullet which killed Zerbe came from the revolver fired by the latter's employer in an attempt by him to frustrate the attempted robbery. We have no doubt that even under these facts, which facts the Commonwealth does not concede, the complained of conviction was proper.
>
> A man or men engaged in the commission of such a felony as robbery can be convicted of murder in the first degree if the bullet which causes death was fired not by the felon but by the intended victim in repelling the aggressions of the felon or felons. This is a question which apparently has never before arisen in this Commonwealth and has arisen elsewhere only rarely. Our Act of June 24, 1939, P. L. 872, section 701, 18 PS 4701, reads as follows: 'All murder which shall be . . . committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree.' This section is, with the addition of the word 'kidnapping' and with a negligible change in phraseology, a re-enactment of the corresponding provision of the Criminal

Code of March 31, 1860, P. L. 382, and of later Acts and of the Act of 1794.[2]

The numerous states which have copied this Pennsylvania statute, (including the states of Massachusetts, New York, Connecticut, New Jersey and Michigan) all use in their respective statutes the word 'murder' instead of the word 'homicide' for the reason that a killer in the malicious perpetration of one of the specified felonies has committed common law murder. The felon obviously possesses that 'wickedness of disposition, hardness of heart, cruelty and recklessness of consequences and a mind regardless of social duty' (*Commonwealth v. Drum*, 58 Pa. 9) which constitutes malice. Blackstone, Book IV, section 199, says that 'The grand criterion which now distinguishes murder from other killing' is that malice which is 'the dictate of a wicked depraved and malignant heart.' This court said in *Commonwealth v. Kelly*, 333 Pa. 280, 287, 4 A. 2d 805, 'To this Commonwealth one must answer as a malicious criminal for any fatal injury he here causes a human being by anything done by him intentionally or unintentionally during the commission or attempted commission of any of the specified felonies, for malice is the mainspring of his outlawed enterprise and his every act within the latter's ambit is imputable to that base quality. Such a rule is essential to the protection of human life.' In that case we held, as we had previously in *Commonwealth v. Lessner*, 274 Pa. 108, 118 A. 24, that 'when in the commission or attempted commission of a robbery there is "no break in the chain of events" be-

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[2] Wharton's Criminal Law, Vol. I, 12th Ed., page 730, section 503, says of the Pennsylvania statute on this phase of murder: 'The earliest of these statutes was that of Pennsylvania, and was drafted by the first Mr. William Rawle and Mr. William Bradford, jurists, as distinguished for their humanity as for their legal capacity. As the Pennsylvania statute has been reproduced in a majority of the states in the Union, it forms the basis of most of the adjudications which have been given under this head.' Wharton is evidently referring to the Act of April 22, 1794, 3 Smith Laws 187, section 2.

tween the felony and the shooting which caused death, even though "the discharge [of the gun] was unintentionally caused [by the felon] while struggling with his victim, or with a third party who came to the latter's assistance," the defense of accidental killing is inadmissible and the homicide is, under the statute, "murder of the first degree." '

The doctrine that when malice is the mainspring of a criminal act the actor will be held responsible for any consequence of his act though it was not the one intended was recognized centuries ago when it was held that, quoting from Blackstone, Book IV, page 1599, section 201, 'if one shoots at A and misses him, but kills B, this is murder, because of the previous felonious intent, *which the law transfers from one to the other.*' (Italics supplied). It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act. For any individual forcibly to defend himself or his family or his property from criminal aggression is a primal human instinct.[3] It is the right and duty of both individuals and nations to meet criminal aggression with effective countermeasures. Every robber or burglar knows when he attempts to commit his crime that he is inviting dangerous resistance. Any robber or burglar who carries deadly weapons (as most of them do and as these robbers did) thereby reveals that he expects to meet and overcome forcible opposition. What this court said in *Commonwealth v. LeGrand*, 336 Pa. 511, 518, about burglars, applies equally to robbers: 'Every burglar is a potential

[3] 'Such homicide as is committed for the prevention of any forcible and atrocious crime is justifiable by the law of nature; and also by the law of England.' 4 Blackstone, section 181.

assassin and when his felonious purpose encounters human opposition his *intent to steal* becomes an *intent to kill* and any weapon he finds at hand becomes a weapon of murder.' Every robber or burglar knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. For whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible. For Earl Shank, the proprietor of a gas station in Ridley Township, Delaware County, which at 11 P. M. on July 13, 1946, was being attacked by armed robbers, to return the fire of these robbers with a pistol which he had at hand was as proper and as inevitable as it was for the American forces at Pearl Harbor on the morning of December 7, 1941, to return the fire of the Japanese invaders. The Japanese felonious invasion of the Hawaiian Islands on that date was in law and morals the proximate cause of all the resultant fatalities. The Moyer-Byron felonious invasion of the Shank gas station on July 13, 1946, was likewise the proximate cause of the resultant fatality.

If *in fact* one of the bullets fired by Earl Shank in self-defense killed Harvey Zerbe, the responsibility for that killing rests on Moyer and his co-conspirator Byron, who had armed themselves with deadly weapons for the purpose of carrying out their plan to rob Shank and whose murderous attack made Shank's firing at them in self-defense essential to the protection of himself and his employees and his property. If, for example, a father sees his child being kidnapped and opens fire, as any normal father would be expected to do if he had a gun available, and if the bullet which he fires at the kidnapper inadvertently kills the child, the death of the child is properly attributable to the malicious act of the kidnapper. The principle which sustains this conclusion is expressed by Bishop on Criminal Law, 9th Ed., Vol. 2, section 637, page 480, as fol-

lows: 'It is a rule both of reason and law that whenever one's will contributes to impel a physical force, whether another's, his own, or a combined force proceeding from whatever different sources, he is responsible for the result, the same as if his own unaided hand had produced it. The contribution, however, must be of such magnitude, and so near the result, that sustaining to it the relation of contributory cause to effect, the law takes it within its cognizance.'

Stephen's History of the Criminal Law of England, Vol. 3, page 21, says that at common law 'murder was homicide with malice aforethought and that the latter consisted of any of the following states of mind: 1. . . . 2. . . . 3. . . . 4. An intent to commit any felony whatever.' Blackstone, Book IV, pages 192-193, says: 'When an involuntary killing happens in consequence of an unlawful act it would be either murder or manslaughter according to the nature of the act which occasioned it, but in consequences naturally tending to bloodshed it will be murder.'

In *Keaton v. State,* 57 S. W. 1125, the Court of Criminal Appeals of Texas held that where the defendant and others went to rob a train, and, after stopping it, forced the fireman to the door of the express car, after being warned that some one would probably commence shooting at them from the rear of the car, and persons resisting the attempted robbery, and *intending to kill the robbers, shot and killed the fireman,* the defendant was held guilty of murder.

In the case of *Taylor v. State,* 55 S. W. 961, which grew out of the same train robbery, it was likewise held that the defendant was properly convicted of murder in the first degree. The court said in that case, 'The whole question here is one of causal connection. If the appellant here set in motion the cause which occasioned the death of deceased, we hold it to be a sound doctrine that he would be as culpable as if he had done the deed

with his own hands.' In Bishop on Criminal Law, Vol. 2, section 657, page 500, it is stated: 'Any employment of unlawful force, whereby the life of a human being is taken, whether this result was intended or not, is a felonious homicide.' In section 679 it is stated: 'Whenever one without legal excuse or palliation does what is directly and immediately dangerous to life, any homicide which results therefrom, whether intended or not, is deemed by the law to have proceeded from malice aforethought and is murder, not manslaughter.' In *People v. Manriquez*, 206 P. 63, the Supreme Court of California held that homicide, committed in the perpetration of a robbery, was murder in the first degree, notwithstanding defendant's claim that the pistol went off when his victim grabbed at it.

In the so-called 'Anarchists' Case,' *Spies et al. v. People* (1887) 122 Ill. 1, 12 N. E. 865, 3 Am. Stat. 320, it was held that any act done by a party to an unlawful conspiracy, in furtherance of and naturally flowing from the common design, is the act of each and all of the conspirators, (1) even though the conspirator who did the act cannot be identified; or (2) though the defendant may have been absent; or (3) though the act charged may not have been arranged for; or (4) was unauthorized in point of time, place, occasion or instruments; or (5) was not anticipated, if the conspirators either did or ought to have anticipated the result, although they did not contemplate the means.

The man who hurled the deadly bomb was never identified and there was no direct proof that he was ever in privity with the defendants and there was only circumstantial proof that the defendants' inciting of others to overthrow the social order by violent methods and to kill law officers was a contributing factor in the throwing of the destructive projectile.

The Illinois Supreme Court in affirming the judgment and the death sentence against seven of the defendants

held that whether the fatal act 'naturally flowed' from the criminal design of the defendants was a fact for the jury's determination. It quoted the following from I Bishop Criminal Law, section 636: 'A man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally through some other specific or a general evil purpose. When therefore, persons combine to do an unlawful thing, if the act of one proceeding or growing out of the common purpose terminates in a criminal result, though not the particular result meant, all are liable.' The court also said: ' "He who inflames people's minds, and induces them by violent means to accomplish an illegal object, is himself a rioter, though he takes no part in the riot." Reg. v. Sharpe, 3 Cox, Crim. Cas. 288. "One is responsible for what wrong flows directly from his corrupt intentions. . . . If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. . . . If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible." 1 Bish. Crim. La., section 641. . . . It was a question for the jury whether, . . . the attack upon the police at the Haymarket "was so connected with the inflammatory language used that they cannot be separated by time or other circumstances." '

In *Johnson v. Alabama,* 38 So. 182, 2 L. R. A. (N. S.) 897, it was held by the Supreme Court of Alabama that one who, by interfering in aid of his insane parent, whom officers are attempting to arrest, frees his hands, and enables him to kill one of the officers, is guilty of murder. 'The person who unlawfully sets the means of death in motion . . . is the guilty cause of the death at the time and place at which his unlawful act pro-

duces its fatal result; . . .': Gray, J. in *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89.

In the law of *torts*, the individual who unlawfully sets in motion a chain of events which in the natural order of things results in damages to another is held to be responsible for it. In *Boggs v. Jewell Tea Co.*, 266 Pa. 428, 433, this court said, quoting from 1 Thompson on Negligence, section 52, 'Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer.' See also, *Cameron v. Citizens Traction Co.*, 216 Pa. 191, and *King v. Lehigh Valley R. R.*, 248 Pa. 255.

In *Insurance Co. v. Boon*, 95 U. S. 117, the U. S. Supreme Court held that when in a Missouri city in 1864 an armed force of Confederates attacked the city and the commander of the United States forces of the city upon realizing that he could not successfully defend the city, set fire to the city hall in order to prevent military stores in that hall from falling into the Confederate hands and the fire spread from the city hall to neighboring properties destroying the property of one Boon who had a policy of insurance upon the goods in that property, the proximate cause of the fire which destroyed the plaintiff's property was 'the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the causa causans which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the Federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly

in the line of the force set in motion by the usurping power, and what that power must have anticipated as a consequence of its action. . . . It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole.' The court held that the loss by the fire which destroyed plaintiff's property was excepted from the risk undertaken by the insurers.[4]

This same principle is illustrated in the so-called 'Squib Case' of *Scott v. Shepherd,* 2 William Blackstone's Rep. 892. In that case, there was instituted an action of trespass for tossing a lighted squib against the infant plaintiff and striking him on the face and so burning one of his eyes that he lost the sight of it. The facts were that on the 28th of October 1770, defendant threw a lighted squib made of gunpowder from the street into the market house. A large concourse of people were assembled there. One Willis to prevent injury to himself and to the goods of one Yates, grasped the lighted squib and threw it across the market house where it fell upon one Ryal. The latter, to save his own goods from being injured, took up the lighted squib and threw it to another part of the market house and struck the plaintiff in the face, putting out one of his eyes. In that case, Justice Gould said, '. . . the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defense, and deprived them of the power of recollection. What they did therefore was the inevitable consequence of the defendant's unlawful act.' Chief Justice DeGrey said, 'The throwing the squib was an act unlawful and tending to affright the by-

[4] The policy contained the following stipulation: 'Provided always and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire.'

standers. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it;—*Egrediturpersonam,* as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder . . .' The court held that an action of trespass was maintainable against the defendant Shepherd whose unlawful act started the squib on its journey through two other hands to the eyes of the plaintiff.

In *Welser et al. v. United Gas Improvement Co.,* 304 Pa. 227, 155 A. 561, which involved the question of the proximate cause of an injury in a tort case, this court said 'the defendant's employees were responsible for a situation which would naturally cause the [police] officer to act as he acted in this case.' We quoted the following from *Lane v. Atlantic Works,* 111 Mass. 136, 139, 'The act of a third person, intervening and contributing to a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable, direct cause of the injury.'

There is no reason why the principle underlying the doctrine of proximate cause as illustrated in three civil cases just cited should not apply to criminal cases also. Chief Justice DeGrey, in the squib case, supra, showed that he regarded the analogy between civil and criminal cases in which individuals are injured or killed as being so close that the principle of proximate cause applied to both classes of cases."

* * * * * * * *

In the case of this petitioner, Commonwealth v. Almeida, 362 Pa. 596 (1949), in a decision written by Mr. Chief Jus-

tice Maxey (Mr. Justice Jones dissenting), this doctrine was reaffirmed, and starting at page 603, thereof it is said:

> "The *factual* issue the defendant raises in this case is identical with the factual issue raised by the defendants in *Commonwealth v. Moyer and Byron*, supra; to wit, who fired the fatal bullet—one of the robbers or a man who was lawfully resisting the criminal attack of the robbers? The *legal* question presented and decided in the *Moyer-Byron* case was precisely the legal question raised in the instant case; to wit, when men who are feloniously shot at by robbers return their fire in self-defense and a third person is killed by a shot fired by the defenders, are the robbers whose felonious action caused the shooting guilty of murder? In the *Moyer-Byron* case this court after a thorough discussion of that question decided that under the facts of that case, 'The Moyer-Byron felonious invasion of the Shank gas station on July 13, 1946, was likewise the proximate cause of the resultant fatality.' (191 of 357 Pa.) That was not dictum but authority. 'Whenever a question fairly arises in the course of a trial, and there is a distinct decision thereon, the court's ruling in respect thereto can in no sense be regarded as mere "dictum".' *New York Cent. & H. R. R. Co. v. Price*, 159 F. 330, 332, 86 C. C. A. 502, 16 L. R. A., N. S., 1103. See also *Schuetz's Estate*, 315 Pa. 105, 172 A. 865. Our decision in *Commonwealth v. Moyer and Byron*, supra, is authority for our decision in this case.
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> Our decision in the *Moyer-Byron* case was an application of the long established principle that he whose felonious act is the *proximate* cause of another's death is *criminally* responsible for that death and must answer to society for it exactly as he who is *negligently* the *proximate cause* of another's death is *civilly* responsible for that death and must answer in damages for it. Wharton on *Homicide*, Third Edition, pg. 30, says under the heading of 'Causal Connections' that: '. . . one

whose wrongful act hastens or accelerates the death of another, or contributes to its cause, is guilty of homicide, though other causes co-operate. And he is guilty *if his act was the cause of the cause of death, if the relation was causal,* and the injured condition was not merely the occasion upon which another cause intervened not produced by the first injury, or related to it in any other than a casual way, then the person inflicting the injury is guilty of homicide.' Professor Joseph H. Beale of Harvard Law School in an article entitled 'The Proximate Consequences of an Act,' 33 Harvard L. R. 633, 646, said: 'Though there is an active force intervening after defendant's act, *the result will nevertheless be proximate if the defendant's act actively caused the intervening force.* In such a case the defendant's force is really continuing in active operation, *by means of the force it stimulated into activity.* . . . Defendant may by his conduct so affect a person or an animal as to stir him to action; the result of such action is chargeable to defendant. . . . Defendant by threats of violence drove his wife through the house until she jumped out of the window; he was a proximate cause of the injury thereby resulting to his wife.' Citing: *Reg. v. Halliday,* 61 L. T. R. 701, 702 (1889), where Lord Coleridge, C. J., said: 'If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result.' Professor Beale sums up the requirements of proximity of result as follows: '1. The defendant must have acted (or failed to act in violation of a duty). 2. The force thus created must (a) have remained active itself *or created another force which remained active until it directly caused the result;* or (b) have created a new active *risk* of being acted upon by the active force that caused the result.'

These principles apply to *both crimes and torts.* Professor Beale in an article entitled 'Recovery for Consequences of an Act,' 9 Harvard L. R. 80, 84, says: 'Professor Wigmore has lately suggested certain principles upon which liability for a tort is to be determined. The *same* principles determine criminal responsibility, . . . We are to show, then, in the first place, that the act may properly be called defendant's act because of this force which he set in motion; and that being done, we are to show that the defendant is to be held legally responsible for his act.'

Justice Holmes in his book on 'The Common Law,' (36 Ed.) pp. 56 and 57, said: 'Acts should be judged by *their tendency under the known circumstances,* not by the actual intent which accompanies them . . . the object of the law is to prevent human life being endangered or taken . . . the law requires [men] at their peril to know the teachings of common experience, just as it requires them to know the law . . . the test of murder is the degree of danger to life attending the act under the known circumstances of the case.'

Bishop, Vol. 2, New Criminal Law, section 424, says: 'He whose act causes in any way, directly or indirectly, the death of another, kills him, within the meaning of the law of felonious homicide. It is a rule both of reason and the law that whenever one's will *contributes to impel a physical force, whether another's, his own, or a combined force, proceeding from whatever different sources, he is responsible for the result, the same as though his hand, unaided, had produced it.* The contribution, however, must be of such magnitude, and so near the result, that, sustaining to it the relation of contributory cause to effect, the law takes it within its cognizance.' Green, in his book entitled *Rationale of Proximate Cause,* pp. 132-133 (1927), says: 'Causal relation is the universal factor common to all legal liability. . . . *And it is exactly the same problem wherever*

found and is soluble by the same process.' (Italics supplied in this and the three preceding paragraphs.)

Courts in the United States, England and Canada have applied the foregoing principles of 'proximate cause' in murder cases, as the cases now to be cited and reviewed in this opinion demonstrate.

The principle of proximate cause in *criminal* cases was applied by one of the ablest of Pennsylvania nisi prius judges 105 years ago, to wit, President Judge King, in the case of *Commonwealth v. Hare*, 2 Pa. L. J. Reports, 467 (1844). Two *separate* bodies of men were fighting each other with firearms in a public street, and as a result a citizen was killed. Judge King held that the members of *both* bodies of men were guilty of felonious homicide. At the trial of Isaac Hare, one of the rioters, on a charge of murder, President Judge King instructed the jury, inter alia, as follows: 'If during such a scene of unlawful violence an innocent third person is slain, . . . such a homicide would be murder at common law in all the parties engaged in the affray. It would be a homicide, the consequence of an unlawful act, and all participants in such an act are alike responsible for its consequences. *If the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. . . . Shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not.* The law declares to such outlaws: you are *equally involved* in *all* the *consequences* of your assault on the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? . . . Joseph Rice was killed . . . at a time when the probabilities

are that both belligerents were maintaining a desultory fire upon each other, and hence it becomes difficult to say with positive accuracy by which he was killed. Are the party *at the market* to escape the consequences of his death by raising a doubt *whether a shot from their opponents* at Jefferson street, Harmony court and the Germantown road, may not have killed him?' After stating that 'each and all are criminally liable for all *the consequences flowing from* such acts of unauthorized vengeance,' Judge King said: 'Such we believe to be the law, founded on the plainest reason, justified by the clearest expediency, and demanded by the most obvious necessity.' (Italics supplied.)

Applying the aforegoing principles to the instant case, we have a band of robbers engaged in an exchange of shots with city policemen *whose duty it is to subdue the bandits if possible.* In the course of the exchange of deadly bullets Officer Ingling is slain. The policemen cannot be charged with any wrongdoing because their participation in the exchange of bullets with the bandits was both in justifiable self-defense and *in the performance of their duty.* The felonious acts of the robbers in firing shots at the policemen, well knowing that their fire would be returned, as it should have been, was the proximate cause of Officer Ingling's death.

The doctrine of proximate cause in criminal cases was applied by the Supreme Court of Tennessee in *Letner v. State,* 299 S. W. 1049 (1927). The facts were that three youths were crossing a river in a boat at a dangerous point. When the boat was about in the middle of the river someone standing above the western bank shot into the water about six feet from the boat. A second shot hit the water nearer the boat whereupon one of the youths jumped out causing the boat to capsize as a result of which the two other occupants were drowned. The man who fired the shot was indicted for murder. The defense contended that the death of the

two youths was caused by the capsizing of the boat by the third occupant and that this act constituted a supervening cause. The court held that the defendant could not avoid the consequences of his wrongful act by *relying on a supervening cause which resulted naturally and proximately from that act.* The court said: '. . . in the instant case the wrongful act of the defendant; that is, firing at or near the boys in the boat, was the proximate cause, the producing cause, the cause that was primarily responsible for the death of deceased.' The defendant was found guilty of involuntary manslaughter. The jury apparently found that there was no malice in the defendant's act. However, in order to convict him of even involuntary manslaughter the jury had to find that the *proximate cause* of the drowning of the deceased was the firing by the defendant of two shots near the boat in which the deceased was sitting when it was capsized by the action of a *third* occupant who having been frightened by defendant's shooting, jumped out of the boat in such a way as to capsize it. The 'jumping out' from the boat, which act capsized it, was the natural result of the defendant's unlawful act in firing shots toward the boat, and his unlawful act was, therefore, the proximate cause of the fatality.

In *State v. Leopold*, 110 Conn. 55, 147 A. 118, 121, the defendant and another were tried for murder of two boys, children of a tenant, by willfully burning a building. Defendant employed one Weiss to set fire to the building for the purpose of collecting the insurance. Weiss was killed during the fire.

The two boys of the tenant perished in the fire. It appeared that the boys either remained in the building, or when on the way out were sent back by their father to recover some property and became trapped. The defendant requested the court to charge that 'if they [the boys] had a reasonable opportunity to escape from the burning building and would have escaped but for their

own conduct or the act of their father in directing them to return, the accused could not be found guilty of causing their death.' This instruction the court refused and told the jury that 'the negligence of the victims of a crime did not diminish or nullify the crime and that even if they found the claim as to the conduct of these boys to be true the accused would not thereby be excused.'

The Supreme Court of Connecticut said: 'Every person is held to be responsible for the natural consequences of his acts, and if he commits a felonious act and death follows, it does not alter its nature or diminish its criminality to prove that *other causes cooperated to produce that result.* State v. Block, 87 Conn. 573, 89 Atl. 167 [49 L. R. A. (N. S.) 913]; 13 R. C. L. 748, 751. *The act of the accused need not be the immediate cause of the death;* he is responsible, though the direct cause is an act of the deceased if such act, not being itself an independent and efficient cause, *results naturally from, and is reasonably due to,* the unlawful act of the accused. 29 Corpus Juris, 1079; State v. Badgett, 87 S. C. 543, 70 S. E. 301. If the death of these boys resulted in a *natural sequence* from the setting of the building on fire, even though their conduct contributed to or was the immediate cause of it, *the accused would be responsible;* and the effort of a person to save property of value which is liable to destruction by fire is such a natural and ordinary course of conduct that it cannot be said to break the sequence of cause and effect.' (Italics supplied.) The conviction of the defendant was sustained.

In the Chicago 'Anarchists' Case,' *Spies et al. v. People,* 122 Ill. 1, 12 N. E. 865, 3 Am. Stat. 320, the principle of proximate cause was applied. In that case the man who hurled the death-dealing bomb at the policeman was never identified, and there was no *direct proof* that the defendants had ever acted in concert with

him. There was no proof *except an inference* that the defendants had induced the man who threw the deadly bomb to do so by inflaming his mind to commit murder. However, the Supreme Court of Illinois, in affirming the judgment of guilty with the death penalty imposed on seven defendants said, quoting 1 Bish. Criminal Law, section 641: 'One is responsible for what of wrong flows directly from his corrupt intentions. . . . *If he set in motion the physical power of another, he is liable for its result.*' (Italics supplied.)

In the instant case we do not have to rely upon inferences to support the fact that Almeida and his confederates started the chain of events that resulted in the death of Officer Ingling. Their acts were 'the cause of the cause' of the murder. They 'set in motion the physical power' which resulted in Ingling's death and they are criminally responsible for that result. Whether the fatal bullet was fired by one of the bandits or by one of the policemen who were performing their duty in repelling the bandit's assault and defending themselves and endeavoring to prevent the escape of the felons is immaterial. Whoever fired the fatal shot, the killing of Officer Ingling had its genesis in the robbing by the defendant and his confederates of the Acme Market, and in their firing upon the police officers who in the performance of their duty were attempting to take them into custody.

Anyone who understands the facts in the case of *Johnson et al. v. State*, 142 Ala. 70, 2 L. R. A. (N. S.) 897, 38 So. 182, will comprehend that the court in that case applied the principle of proximate cause as we do in the instant case. The case arose on an application for bail for two women charged with murder in the first degree. Bail was refused. The Supreme Court of Alabama said: '. . . The evidence establishes that [John Johnson] the father of these petitioners shot and killed a deputy sheriff [George Bryan] in resisting

his arrest by that officer and others. No justification is shown for the killing. And it is reasonably certain that had these petitioners [Johnson's daughters] not interfered, the killing would not have occurred. Indeed, their father would have been overpowered by the officers without bodily harm to him, and thus been rendered impotent to have procured and used the pistol with which he inflicted the deadly wounds, *had they not by their conduct freed one of his hands from the grasp of the officer who was killed.* That *these petitioners' conduct, under the evidence, was the cause of the killing, scarcely admits of doubt.* . . . The theory seems to be that if he [the father] was insane, and therefore incapable of committing murder, the petitioners are not criminally responsible for his act of firing the pistol which produced the death of the officer. Had the trial judge permitted this proof to have been made, and had found in line with it, in view of the conduct of the petitioners on the occasion of the homicide, which was calculated to incite, and did incite the father to commit the crime, they are responsible for his act.' (Italics supplied.)

The word 'incite' means 'to spur or urge on, as, to incite a mob to violence' (Webster's Dictionary). It ordinarily implies something *said* by the inciters. The word 'incite' as used by the Alabama court was, under the facts of that case, ill chosen, because in that case the record shows that Johnson's daughters *said nothing* to their father before the fatal shooting, but one of them did cause the Deputy Sheriff, George Bryan, to unloose his hold on Johnson by striking the Deputy Sheriff on the back of the head with a scantling. Johnson then drew a pistol and fatally shot Bryan. It is obvious that the Alabama Court held Maggie Johnson prima facie guilty of murder not because she assaulted the deputy sheriff, but because *by so striking* the deputy sheriff with the scantling *she caused him to unloose*

his grasp on her father's arm and the latter was thereby *enabled* to shoot the deputy sheriff. The court said that, 'They by their conduct freed one of his [the killer's] hands' and 'their conduct was the cause of the killing.'

Wharton on Homicide, Third Edition, page 23, interprets this Alabama case as sustaining the following principle: '. . . one who, by interfering in aid of an innocent person,[2] whom officers are attempting to arrest, frees his hands and enables him to kill one of the officers, is guilty of murder.'

In *Taylor v. State*, 55 S. W. 961 (Texas), the facts were that during an attempt to rob a train one of the robbers took Johnson, a fireman on the train, from the engine to the front of the express car. While Newman and Johnson were parleying at the express car Buchanan, a passenger on the train came out of the rear of a passenger coach and began firing. The robbers returned the fire. The fireman was shot and killed by a shot fired by the passenger. The appellant objected to the charge of the court on the ground, first, that the evidence did not show that defendant and those acting with him placed Johnson in front of the express car to get him shot, *but to prevent a shooting*, and second, because in front of the express car was not more dangerous than at any other place along the line. The Texas Court of Criminal Appeals said: 'The whole question here is one of causal connection. *If the appellant here set in motion the cause which occasioned the death of deceased, we hold it to be a sound doctrine that he would be as culpable as if he had done the deed with his own hands.*' (Italics supplied.) The court then cited the following from 2 Bishop New Cr. Law, section 424, etc.: 'He whose act causes in any way, directly or indirectly, the death of another, kills him, within the meaning of the law of felonious homicide. It is

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[2] Wharton used the words 'innocent person', but apparently it is an inadvertence. The words should be 'insane person'.

a rule both of reason and the law that whenever one's will *contributes to impel a physical force, whether another's, his own, or a combined force, proceeding from whatever different sources, he is responsible for the result, the same as though his hand, unaided, had produced it.'* (Italics supplied.) The court said further: 'They [the robbers] put him [the fireman] there in order to effect the robbery, and while they required him to remain at the post assigned him, which was a place of danger, he was shot. His life was taken on account of their direct and lawless act, and they are responsible for his murder, whether it was occasioned by their own volition or by the shots of their adversaries; and their act was the proximate cause of the destruction of his life, and they cannot escape the consequences.' In that case the judgment was reversed due to the erroneous admission of evidence 'introduced through testimony of the District Attorney.'

It was putting the fireman in a dangerous place *'to effect the robbery'* which made the killing of the fireman murder in the first degree. Putting a man in a dangerous place where he is *accidentally* killed is not murder in any degree *unless the act was done maliciously.* The Texas train robbers *did not* put the fireman in a dangerous place so that he would be killed. They could easily have killed him with their own weapons, but killing him would serve no purpose of theirs. He was worth more to them alive than dead. The *obvious inference* is that they put him in a place which proved to be a place of danger, *not* to have him killed but to *prevent firing* from the direction of the passenger cars 'in order to consummate their purpose.' (The words quoted are the Texas Court's.) As their purpose was *to rob the express car, this malicious purpose made every one of their acts malicious.* When the fireman was killed (contrary to the robbers' intention) with a bullet fired by a passenger, this killing

became murder in the first degree because the train robbery in itself was a malicious act and *everything that the train robbers did in effecting their felonious purpose* was criminally tainted with the malice which motivated their planning of the robbery.

In *Keaton v. State,* 57 S. W. 1125, another one of the same train robbers was convicted of murder in the first degree for killing the fireman. The Texas Court of Criminal Appeals in sustaining the conviction quoted with approval this principle from *Blain v. State,* 30 Tex. App. 702, 18 S. W. 862: 'Again, if a person instigates or agrees with another to commit a crime, and the person so instigated commits a crime different from, *but one likely to be caused by or become the reasonable result of, the crime intended,* the instigator is an accessory before the fact, and, if present at its commission, is a principal thereto.'

The case of *Taylor v. State,* 63 S. W. 330, was again before the Court of Criminal Appeals of Texas. In the second trial the court charged the jury as follows: "If you should find that defendant, and those, if any, acting with him in an attempt to perpetrate a robbery, did not compel said Lee Johnson to leave a place of safety, and approach, be, and remain in a place of danger, but that said Johnson voluntarily, willingly, and not under fear of violence from such parties, left a place of safety, and had voluntarily placed himself in danger, and that, in consequence of so exposing himself to danger voluntarily, received the fatal shot, and was thereby killed by those resisting the design to rob, then, if you so believe, or if you have a reasonable doubt thereof, you will acquit defendant.' As to that the appellate court said: 'While this charge is not drawn, perhaps, as accurately as it should have been, yet, taken as a whole, it submits the question of Johnson voluntarily leaving a place of safety, and placing himself in danger, without fear of violence or compulsion from defendant and his

co-conspirators; and under these circumstances they would not be responsible for his death. We are of opinion this sufficiently submits *this theory of the case.*' (Italics supplied.) The court *did not say whether or not this theory was correct* from the standpoint of the Commonwealth. It said in effect that this was *a* 'theory of the case.' From what the court had said when the case was first before it, it is a reasonable inference that the verdict of guilty would have been sustained even if Johnson had *voluntarily* left a place of safety and gone to the place where he was shot. The verdict of guilty would have been justified because the homicide was committed in the perpetration of a robbery. As the court said in its opinion in the first case in its quotation from 2 Bishop New Cr. Law, '. . . whenever one's will contributes to impel a physical force, whether another's, his own, or a combined force . . . he is responsible for the result.'[3]

In *Wilson v. State,* 68 S. W. (2d) 100, (Ark.), the defendants were charged with the murder of a bank teller. In effecting their escape after robbing a bank they forced the teller to accompany them in an attempt to shield themselves from an attack upon the part of the town marshal. The town marshal accidentally killed the teller when shooting at the robbers. It was held that the defendants were guilty of murder both at common law and under the statute. The court in its opinion stated: 'They [the robbers] wished to use him [the teller] as a breastwork, as it were, or they thought perhaps the outsiders would not shoot at them for fear of killing Guthrie. In doing this they committed another crime, kidnapping, and caused Guthrie's death.' The court cited the following, inter alia, from 29 C. J.

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[3] Professor Beale said of these Texas cases: 'Defendants were forcing this person [the trainman] to accompany them; but the court was willing to decide the case **without relying upon that additional** fact' (Bold face supplied) 33 Harvard Law Review, **649, footnote 65.**

1077: 'Defendant's act or omission need not be the immediate cause of the death; he is responsible if the direct cause results naturally from his conduct.'

In a case where a man while committing a robbery or attempting to escape from a place where he had just been committing a robbery uses another person as a shield to prevent firing in the robber's direction and the human shield is killed by someone lawfully firing at the robber, the malice that would make the killing murder by the robber would not arise from the fact of using another person as a shield but *from the robbery itself*, which is a crime motivated by malice. If a person *not engaged* in the commission of a malicious crime suddenly found himself being shot at and he places some person in front of him as a shield in the honest and reasonable belief that in doing so he would prevent further firing in his direction, and if at the instant of his doing so or immediately thereafter a shot was fired in his direction and the human shield was killed, the person so using the human shield would not be guilty of murder because his act was not motivated by malice and he was not engaged in the commission of a felony. Putting a person in a place of danger unless there is malice in the act is not a felony, even if that person is killed. For example, if the driver of an automobile invites someone to ride in his car and the car becomes a place of danger through the driver's negligence and the passenger is killed as a result thereof, the driver would ordinarily not be guilty of any higher offense than involuntary manslaughter.

In *People v. Manriquez*, 206 Pac. 63 (Cal.), the facts were that a homicide resulted from the attempt of the defendant and two others to rob a store. The defendant testified that as soon as he 'put his gun on him [the Chinese proprietor] . . . he tried to grab it. . . . When the Chinaman grabbed at me, the pistol went off, and he went down, and I ran out . . .' Although the *imme-*

diate force which caused the revolver to go off *was supplied by the victim in grabbing the gun,* the defendant and his accomplices were held to be guilty of murder in the first degree and their conviction was affirmed.

The claim that no English case sustains our position in this case is without foundation. The following English cases show that British courts like our own, have applied the principle of proximate cause in determining guilt in criminal cases. As the principle is expressed in 1 East, Pleas of the Crown, 257: lawless individuals 'must at their peril abide the event of their actions'.

In the case of *Queen v. McIntyre,* 2 Cox, C. C. 379, a husband kicked his wife, injuring her, and the physician administered brandy as a restorative, some of which entered the wife's lungs and caused her death. It was held that the husband was properly indicted for, and convicted of, her murder, where the blow rendered the application of the brandy necessary, and the *defective power of swallowing was the consequence of the blow.*

In *Reg. v. Towers,* 12 Cox's Criminal Cases 530, 533, the facts were that the defendant in assaulting a woman who had in her arms an infant so frightened it that it had convulsions and died within six weeks. It was held that it was for the jury to say whether the child's death was the direct result of the prisoner's unlawful act. Judge Denman said: 'If he were to say, as a conclusion of law, that murder could not have been caused by such an act as this, he might have been laying down a dangerous precedent for the future; for, to commit a murder, a man might do the very thing this man had done.'

In *Rex v. Hickman,* 5 Car. & P. Reports 151, the defendant made an assault upon a man riding on horseback by striking him with a stick. The victim acting from well-grounded apprehension of a further attack which would endanger his life spurred on his horse,

whereby the horse became frightened and threw him off as a result of which the rider sustained a mortal wound. The defendant's conviction of manslaughter was held to be proper.

In *King v. Hodgson and Others*, 1 Leach 6, 168 Eng. Rep. 105 (1730): 'The prisoners, together with several others, were hired by one J. S. to assist him in carrying away his household furniture, in order to avoid its being distrained for rent. They accordingly assembled for this purpose, armed with bludgeons and other offensive weapons. The landlord of the house, accompanied on his part by another set of men, came to prevent the removal of the goods, and a violent affray ensued. The constable was called in, and he produced his authority, but could not induce them to disperse. While they were fighting in the street, one of the company, to the Jurors unknown, killed a boy, who was standing at his father's door looking on, but totally unconcerned in the affray.' The question presented for determination was whether or not this was murder in all the company?

The majority of the judges held 'that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act (see 8 Mod. 165); and therefore the persons, though constructively present, could not be said to be aiding and abetting the death of one who was totally unconcerned in the design for which the parties had assembled.'

On the other hand, the two Chief Justices (Holt and Pollexfen) held the opinion 'that it was murder in all the company, because they were all engaged in an unlawful act, by proceeding in the affray after the constable had interposed, and commanded them to keep the peace, especially as the manner in which they originally assembled, viz, with offensive weapons and in a riotous manner, was contrary to law, though the purpose for

which they assembled, viz, to carry away the goods was justifiable(1); and cited Stamf. 17, 40; Fitz. Cor. 350; Crop. 244(2), where divers go to commit a disseisin, and one of them kill a man, the rest are principal felons.'

The opinion of Chief Justices Holt and Pollexfen holding criminally responsible for the boy's death all those 'engaged in an unlawful act' is logical and correct. The opinion of the majority which held that because the boy was 'unconcerned in the affray . . . the homicide did not happen in prosecution of the illegal act' is wholly untenable.

In *Rex v. Valade,* Crt. of King's Bench, Quebec, Appeal Side, 26 Canadian Criminal Cases 233, it was held that a man engaged in a criminal act is liable for its indirect as well as its direct consequences. The court there held that when a man took a young girl under the age of consent to a secluded apartment for an improper purpose following which she jumped from the window to the street in order to get away from him and she was killed by the fall, he was guilty of manslaughter.

The decision in *People v. Garippo et al.,* 292 Ill. 293, 127 N. E. 75, does not conflict in the slightest degree with our opinion and decision in the instant case, as anyone who analyzes the facts in the *Garippo* case will readily comprehend. No one disputes the fact that the shooting of Officer Ingling *resulted directly* from the robbery of the Acme Market and from the felons' shooting resistance to arrest by policemen immediately thereafter. In the *Garippo* case, on the other hand, there is *not* the *slightest evidence* that the firing of the bullet which caused the robber's death *was in any way* related to any robbery. The defendant in the *Garippo* case was one of a group of five men who engaged in several holdups. They finally robbed a drunken man who came out of a restaurant. The defendant pushed the drunken man into a hallway. When several of the

group were about ten feet away from where one Scalzitti and Garippo and the drunken man were, a shot was heard, followed by three or four other shots. Scalzitti, one of the robbers, was shot through the forehead and killed instantly. The Supreme Court of Illinois pointed out that there was no positive or direct testimony as to the *killing of Scalzitti.* That court said: 'no motive is shown in the evidence for any of them [the defendants] to do the shooting . . . The drunken man whom they were attempting to hold up did not testify on the trial . . .' The court further said: 'Without doubt there was a common design among these men to hold up the drunken man, *but this design had nothing whatever to do with the shooting of Scalzitti, . . .*' (Italics supplied.) In the *Garippo* case the bullet which killed the robber might have been fired by someone who was aiming at an alley cat or by someone who was recklessly shooting out a window. *Unlike the Almeida case* there was *no causal connection* established between the holdup and the shooting.

An attempt has been made to show that the case of *Butler et al. v. People,* 18 N. E. 338 (Ill.), is opposed to our ruling in this case. Only by ignoring the facts can the decision in that case be so interpreted. In that case no robbery or other felony was involved. The defendants became very noisy and boisterous around a tent show. The village marshal signaled them to keep quiet, but, not being heeded, he stepped up to William Butler and attempted to arrest him. The latter either pushed or struck the marshal. Then Franklin Butler came up behind the marshal and struck him two blows on the head with his fist, which knocked him down, or knocked him on his hands and knees. William Butler then laid hold of the marshal, and the bystanders came up to stop the fight, and while they were parting the men, the marshal discharged his revolver, and John

Butler, a brother of the defendants, who was standing near by, was killed.

The Supreme Court of Illinois in reversing the conviction of the defendants of manslaughter said: 'Here, under the instructions of the court, the two defendants are held responsible for the shooting did by Conrey, although there was no concert of action whatever between him and them. . . . It is true, the defendants assaulted Conrey, and struck him with their fists; *but his life was not in peril, nor was he in danger of suffering great bodily harm. There was nothing, therefore, in the character of the assault which could justify a prudent man to resort to a revolver.'* (Italics supplied.) In other words the act of the village marshal in firing a bullet into the crowd was not an invited and foreseeable result of any felonious act on the part of the defendants. *They had done nothing which reasonably justified the officer's shooting into the crowd,* and, therefore, they could not be held guilty of the homicide resulting from his unwarranted act. In the instant case these bandits by their murderous shooting at the officers *made inevitable a return fire from the officers.* For the death resulting from this exchange of bullets these felons are morally *and* legally responsible.[4]

The case of *Commonwealth v. Campbell,* 89 Mass. (7 Allen) 541, has been cited in opposition to our decision in this case and in the *Moyer-Byron* decision, supra. Four things are to be noted concerning the opinion in the *Campbell* case, supra. First, what has been quoted from that case, against our holding in the instant case is dicta; second, that dicta is contrary to the law of this Commonwealth as laid down by President Judge King

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[4] In **Taylor v. State,** supra, the Texas Supreme Court of Criminal Appeal analyzed the Illinois case of **Butler v. People** exactly as we analyze it and held that the **Butler** case did not apply to the facts of the case before the Texas court. It also analyzed the case of **Commonwealth v. Campbell** as we analyze it, and the Texas court held that it also did not apply to the facts of the case then before the Texas court.

in *Commonwealth v. Hare,* supra; third, the decision in the *Campbell* case was condemned by Professor James H. Beale, who was during his life a profound student and teacher of criminal law and a highly respected authority on criminal law; and fourth, one excerpt from the opinion in the *Campbell* case is not only opposed to the law of Pennsylvania and the law of England, but is *opposed to common sense and to the welfare of society.*

First: As to the language of the opinion in the *Campbell* case being dicta. The homicide was committed near the Armory in *Cooper* Street in Boston at about 7:00 o'clock in the evening during a riot which grew out of the enforcement of a draft of men for the army. The riotous acts done by the defendant were committed by him in *Charlestown* Street about 1:00 *o'clock in the afternoon,* or about 6 hours before the commission of the homicide. The *first syllabus* of the case *correctly states* what *had* to be and what *was* decided in the case. It reads as follows: 'In an indictment for murder, committed during a riot in which the prisoner was engaged, evidence is incompetent to prove other riotous acts by him at a different place and several hours earlier, unless it is first shown that the various acts were all parts of one continuous transaction.' *That was all that was necessary to decide in the case,*[5] to wit, that the riotous acts done by him were at a different place and several hours before the murder and that the murder and the riotous acts were *not part* of one continuous transaction. From the report of the case there is no evidence whatever that there was *any* connection between the prisoner's participating in the riot at 1:00 P. M. in another part of the city and the shooting at the armory six hours later. From all that appears in

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[5] This Court said in **Schuetz's Estate,** 315 Pa. 105, 172 A. 865, '. . . in every case what is actually decided is the law applicable to the **particular facts**; all other legal conclusions therein are but obiter dicta'. Citing cases. (Bold face supplied.)

the record the defendant may have gone to his home after 1:00 P. M. and completely refrained from all riotous acts. There is nothing in the report of the case that connected the defendant with the riotous acts which incited the shooting at the armory six hours later.

Second: In the *Campbell* case the Attorney General of Massachusetts cited the Philadelphia rioters case, *Com. v. Hare,* supra, in support of the Commonwealth's case. The distinction attempted in the Massachusetts opinion between the facts in the *Campbell* case and the Philadelphia rioters case is not a valid one. The fact that both parties in the Philadelphia riot had 'a common object in view, namely, a breach of the peace', would not justify holding a rioter in group A responsible for a shot fired by a rioter in the hostile group B, unless the whole rioting was the *proximate cause* of the fatal shooting. The statement in the Massachusetts opinion that the *Philadelphia* case is 'obscurely and imperfectly reported' is not correct, unless it is meant that it was imperfectly quoted in the *appendix of Wharton's Law of Homicide.*

Third: Professor Beale's criticism of the decision in the *Massachusetts* case is found on page 649 of 33 Harvard Law Review. He refers to the decision as being 'questionable'. In a footnote he said: 'The decision has unfortunately been followed.' He mentions only 2 cases which followed it, to wit, *Butler v. People,* 125 Ill. 641, and *Commonwealth v. Moore,* 121 Ky. 97. In the *Butler* case the Illinois Court 'followed' the *Campbell* case only to the extent of quoting its dicta. This dicta did not apply to the *Butler* case, because as the Supreme Court of Illinois in that case said: 'There was, therefore, nothing in the character of the assault [made upon the village marshal] which could justify a prudent man in resorting to a revolver.' In the *Almeida* case, the *shooting* by the *officers* was justified and necessary.

The Kentucky case of *Commonwealth v. Moore* does follow the dicta in the *Campbell* case. The North Carolina case of *State v. Oxendine,* 187 N. C. 658, 122 S. E. 568 (1924), follows *Commonwealth v. Moore.* The courts of these two states *are in the minority* in refusing to apply the principle of proximate cause in criminal cases.

Fourth: In the Massachusetts opinion the following question is put: 'Suppose, for example, a burglar attempts to break into a dwelling house, and the owner or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant. Can the burglar in such case be deemed guilty of criminal homicide?' The Massachusetts court answered: 'Certainly not.' That conclusion is without support in common sense and is inconsistent with sound public policy. Where a burglar or kidnapper breaks into a man's home with the intent to steal property therein or to kidnap a child and while so engaged opens fire upon the occupants, and the man of the house returns the fire in an attempt to defend his family, and by mischance he kills his wife or his child, or his servant, the invading felon is *morally and legally responsible for that homicide.* In Pennsylvania and in other jurisdictions such a felon would be adjudged guilty of murder in the first degree. His malicious act would be the proximate cause of the homicide. In the case of *State v. Hauptmann,* 180 A. 809, the defendant, Hauptmann, was convicted of the murder of the Lindbergh child on the theory that he had entered the nursery in an attempt to commit burglary, this intent being inferable from the stealing of the child's clothing, and while the child was being taken down a ladder, it broke and the child was fatally injured. The New Jersey Court of Errors and Appeals said: '. . . the substantial claim throughout was that the defendant feloniously opened the window, seized the child and its clothing,

and attempted to escape through the window again, and that the injuries that caused the child's death were inflicted during the perpetration of that felonious and unlawful act.' There was no claim made that the child was killed *intentionally*. If, for example, there had been a watchman at the Lindbergh home and he had grappled with Hauptmann as the latter was descending the ladder, and as a result of this scuffle the ladder broke, causing the child to fall to the ground and be killed, can there be any doubt that Hauptmann would also have been adjudged guilty under those circumstances? Whether his own weight or the weight of himself *and* the watchman caused the ladder to break would have been immaterial as affecting the result. The kidnapping and the burglary were properly adjudged to be the proximate cause of the child's death.

Under neither the common law nor our statute is an *accidental killing* murder. It is not even a felony. Yet this court has uniformly held that an accidental killing in the perpetration of or the attempt to perpetrate a robbery or burglary or any other of the enumerated felonies is murder in the first degree. The reason is that any person committing or attempting to commit, any of these major felonies is *motivated by malice* and when the killing of a human being directly results, even though *not intended*, from his malicious act, it is murder because *malice*, the essential element of murder, *is present*. The felon's malicious act in perpetrating or attempting to perpetrate, his planned major crime is justly regarded by the law as the causative antecedent of the homicide. In cases of this kind society puts its punitive hand on the person responsible for the legally blamable cause. This doctrine is authoritatively recognized in the law.

There is no decision of this court which has ever ruled contrary to what we are ruling on this question. In *Commonwealth v. Mellor*, 294 Pa. 339, 144 A. 534,

the question now before this court was not then before it. The trial judge in that case, who was the dissenting judge in the instant case in the court below, instructed the jury that if the victim was accidentally killed by a bullet from the policeman Clark's revolver he should be acquitted. All this court said on that subject was that this defense 'was submitted to the jury in a way favorable to defendant'. Since the defendant was convicted and since even if he had been acquitted the Commonwealth could not have taken an appeal, the question now before us was *not* then before this court. This court neither expressly nor by implication approved the instruction of the trial judge in that case and has never declared any such doctrine. In *Commonwealth v. Thompson,* 321 Pa. 327, 184 A. 97, the defendant was convicted of murder in the first degree and his conviction was affirmed in this court. He complained that the trial judge did not adequately present to the jury the evidence in support of his contention that the bullet which killed Mrs. Hoopes was fired from Truitt's pistol. Truitt was a neighbor. This court in affirming the conviction found there was no basis for complaint in the charge of the court. This court *did not pass* upon the question which is now before us.

The following statement from 13 R. C. L., Sec. 60, p. 753, has been cited against our view: 'where persons conspire together to commit robbery, and while carrying out such conspiracy their victim, in self-defense, discharges a firearm at his assailants and accidentally kills a bystander, the conspirators are not guilty of the homicide.' The *only* case which R. C. L. cites in support of that statement is the case of *Com. v. Moore,* 121 Ky. 97, 13 R. C. L., sec. 60, also lays down this principle: 'Whenever an independent responsible person, disconnected with the defendant, causes some intervening act to be done, the defendant is relieved of responsibility for the consequences thereof, *unless*

the act of intervention is the natural result of the defendant's act. (Italics supplied.) In the instant case the act of intervention by the police officer, i. e. the shooting of the bandits, *was* the natural result of defendant's act.

It has been asserted that the case of *People v. Udwin*, 254 N. Y. 255, 172 N. E. 489, holds contrary to our opinion in this case. What the *Udwin* case stands for is shown by its six syllabi. In *none of the syllabi is there discussed the question raised in the Almeida Case.* The *point at issue* was whether or not a killing of one convict by other convicts in an attempt to escape from prison was murder in the first degree where there existed no intent to kill. Also, another question presented was whether all the convicts participating in the attempted escape were equally guilty of murder. *That case decided* that all such convicts were guilty of murder in the first degree. That there may be dictum in the *Udwin* case contrary to the view we express in the instant case is easily explained by the New York statute. The New York statutory definition of felony murder differs from the Pennsylvania statutory definition. The New York statute reads as follows: 'The killing of a human being . . . is murder in the first degree, when committed: . . . *by a person* engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise. . . .' (N. Y. Penal Law §1044, italics supplied.) The phrase 'by a person' does not appear in the Pennsylvania statute, and these words make a vital difference in the two statutes. See footnote 12 at the end of this brief, page 57.

The criticism that our decision in this case is an unusual one is the same criticism which was made against our decision in *Commonwealth v. Doris*, 287 Pa. 547 (1926). Doris with three other bandits was indicted and convicted of first degree murder. Officer Cooper

was shot by Bentley, one of the bandits, while the latter were seeking to escape from the scene of their crime with the money stolen from a bank; *at that time* Doris had actually been arrested and was in police custody. Judge Gordon of the court below, in that case as in the instant case, filed a dissenting opinion, and therein declared that 'there is no direct precedent in Pennsylvania[6] and little outside of this jurisdiction' by which to uphold the conviction of Doris. This court overruled the contention that as Doris has been seized by officers of the law shortly after the flight began but before the killing he could not be held responsible for it. We said: 'This overlooks the fact that he [Doris] joined in the common design, and is responsible for the acts of each *naturally to be expected to occur in carrying it out.* . . . he cannot escape responsibility for an act which is the *probable consequence* of the criminal scheme which he has helped to devise and carry forward.' (Italics supplied.) Likewise, Almeida cannot escape responsibility for what was the 'probable consequence of his criminal scheme' to commit a robbery and make his escape by shooting at, with intent to kill, officers who were trying to capture him.

It has been argued that our opinion in the case of *Commonwealth v. Moyer* and *Commonwealth v. Byron*, supra, and our opinion in the instant case are 'novel.' They are no more of a 'novelty' than was the opinion of this court in *Commonwealth v. Doris*, supra. They are no more 'novel' than was the first decision which ever held that even an accidental killing in the perpetration or attempted perpetration of robbery or burglary is murder in the first degree. That is now the law of this Commonwealth: *Commonwealth v. Lessner*, 274 Pa. 108, 118 A. 24; *Commonwealth v. Kelly*, 333 Pa. 280, and 337 Pa. 171, 10 A. 2d 431. They are not

[6] 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.': Holmes, 'The Path of the Law,' 10 Harv. L. R. 457, 469.

as novel as was the first decision at common law that if one shoots at 'A' and misses him and kills 'B,' this is murder, because of the previous felonious intent, which the law transfers from one to the other. (Blackstone, Book IV, page 1599, section 201.)

What Justice Cardozo said is applicable here: 'when they [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance. . . . The final cause of law is the welfare of society. . . . Justice and general utility, such will be the two objectives that will direct our course.'[7] Justice Holmes said: 'I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.'[8]

There can be no doubt about the 'justice' of holding that felon guilty of murder in the first degree who engages in a robbery or burglary and thereby inevitably calls into action defensive forces against him, the activity of which forces result in the death of a human being.[9] Neither can there be any doubt about the 'general utility' of a ruling which holds this defendant Almeida guilty of the murder of Officer Ingling, even if it had been established that the bullet which killed that officer was fired by one of the police officers who were returning the fire of Almeida and his confederates and were attempting to prevent their escape.

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[7] Cardozo: 'The Nature of the Judicial Process', pp. 66, 67, 73 and 75.

[8] Holmes: 'The Path of the Law', 10 Harv. L. R. 457.

[9] The newspapers six months ago reported that in Vancouver, B. C., a robber entered a bank, shot and wounded two of the employees, and as he was escaping with his plunder, he grabbed a five year old child and held him before his body as a shield to prevent any firing at the robber. A nearby officer, in the performance of his duty, took careful aim and shot the robber between the eyes. The child was not harmed. If the officer had accidentally killed the child instead of killing the robber can there be any doubt that the felon's act in robbing the bank and in attempting to escape with his loot would have been adjudged the criminal proximate cause of the killing of the child?

If Mrs. Ingling should bring an action in tort against Almeida and his confederates for causing the death of her husband there is no doubt of her ability to recover a judgment against them. Since 'Causal relation is the universal factor common to all legal liability' (Green 'Rationale of Proximate Cause', supra) and since, as Professor Beale pointed out (supra), 'All liability is based on proximate cause' and 'the same principles determine criminal responsibility [as determines civil liability],' why should not Almeida be held *criminally*, as well as civilly, responsible for Officer Ingling's death?

The following cases illustrate the principle of proximate cause in the law of torts. In *Welser et al. v. United Gas Improvement Co.*, 304 Pa. 227, 155 A. 561, the facts were that the defendant's employees were unlawfully burning naphtha, a highly inflammable material, in an uncovered bucket in a public street in the City of Philadelphia. A policeman in the performance of his duty kicked over the bucket, spilling its contents and unintentionally injuring a nearby minor. In deciding the question of legal responsibility for the damage done, we said: 'the employees of the defendant company . . . should have foreseen that the burning of this smoke-emitting substance in the street would attract the attention of an officer, that this officer would attempt to extinguish the fire, and that the ordinary, natural way to do so would be to kick over the pail and attempt to smother the flames.' We held the officer guiltless and the defendant legally responsible. We quoted the following from *Hoag v. Lake Shore & Mich. South. R. R. Co.*, 85 Pa. 293, 298: 'In determining what is proximate cause, the true rule is, that the injury must be . . . such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act.' We also cited *Lane v. Atlantic Works*, 111 Mass. 136, 139, where the Supreme Court of

Massachusetts said: 'The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury.'

In the well-known 'Squib Case', *Scott v. Shepherd*, 2 William Blackstone's Rep. 892 (1773), Shepherd, the man who initially *tossed* the lighted squib which destroyed the sight of one of the eyes of one Scott was held responsible for the harmful result of his unlawful act. Shepherd had not directly thrown the lighted squib into the eye of Scott, or in his direction. But when the lighted squib reached another man he in self-defense tossed it away from him, and when it then reached a second man, he likewise in self-defense tossed it away from him. It was held that the man who first threw the lighted squib into the market place was responsible for the loss of Scott's eye because the subsequent action of both Ryal and Yates was the inevitable consequence of the defendant's initial unlawful act.

A comment on the 'Squib Case' appears in an article in 9 Columbia Law Review 136, at 146, entitled *'Legal Cause at Common Law'*. The writer there says: 'There was nothing extraordinary in the sequence which ended in the injury. Indeed, the acts and motives of Willis and Ryall were such as are usual in like situations. . . . Therefore, when through the ensuing events, plaintiff was put in peril from the squib, a breach of a duty owed plaintiff by defendant was consummated. The injury, being the fruition of this peril, of course was chargeable to defendant.'

In *Insurance Co. v. Boon*, 95 U. S. 117, the U. S. Supreme Court held that when in a Missouri city in 1864 an armed force of Confederates attacked the city and the commander of the United States forces of the city upon realizing that he could not successfully de-

fend the city, set fire to the city hall in order to prevent military stores in that hall from falling into the Confederate hands and the fire spread from the city hall to neighboring properties destroying the property of one Boon who had a policy of insurance upon the goods in that property, the proximate cause of the fire which destroyed the plaintiff's property was 'the rebel invasion and military or usurped power. . . . It was the causa causans which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the Federal forces to destroy them.' In the instant case the criminal activities of Almeida and his confederates 'created the necessity' for the police officers to shoot at them.

In *Bloom et al. v. Franklin Life Insurance Co.*, 97 Ind. 478, the facts were that August Bloom, while in a state of intoxication committed assault and battery upon the wife of his brother Albert, and Albert in defending his wife struck his brother upon the head with the jack plane, thereby fracturing his skull and causing his death. The court held that 'The act of the *assured* in this case was the *proximate* cause of his death within the meaning of the law. A man who makes a violent assault upon a woman puts his own person in danger, for a father, a husband, or a child *may interfere to protect the assailed woman*, and *may overcome the assailant by force. Strangers* not only may interfere to protect the person violently assaulted, but are, in strict law, *under a duty to interfere.* The natural result of such an illegal act as that of the assured, therefore, was to bring his person into danger, and as death resulted his own act was the proximate cause.' (Italics supplied.)

The Restatement of the Law of Torts, Section 279, says on the subject of causation: 'If the actor's conduct is intended by him to bring about bodily harm to an-

other which the actor is not privileged to inflict, it is the legal cause of any bodily harm of the type intended by him which it is a substantial factor in bringing about.' Comment c says: 'the wrongful character of the intervening force is of no moment. This is so not only where the injury is brought about by an intervening negligent act of a third person (see §447), but also where it is brought about by the tortious or criminal act of a third person which itself is intended to bring about the harm which is sustained by the other.'

Section 443 of the Restatement of the Law of Torts reads as follows: 'An intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about.' Comment a says: 'It is enough that the act is a normal response to the stimulus of the situation created by the actor's negligence.'

In the *Almeida* case the shooting *by* the policemen was 'a normal response to the stimulus of the situation created by the actors',' i. e. the robbers', criminal act in shooting *at* the policemen.

Two illustrations from the Restatement of Torts are apposite here:

Illustration 2, Comment c of §445: 'A incites a mob to attack a jail in order to lynch B, a prisoner therein. C, one of the wardens, in resisting the attack fires on the mob. One of the bullets goes astray and enters the kitchen window of a nearby house, causing harm to D who is cooking supper therein. C's action is not a superseding cause of D's harm.' If D was *killed* why should not A be held *criminally* responsible?

Illustration 3, Comment c of §445: 'A attacks B upon the street. B raises his cane to ward off A's attack. In so doing he strikes C, a fellow traveler. A's attack upon B is the legal cause of the harm sustained by C.' If

such is the law, and it is, why should not the actions of Almeida and his confederates be held to be the legal cause of the harm sustained by Ingling? Firing a pistol to 'ward off an attack' by bandits is in law no different from raising a cane to 'ward off' an attack.

A knave who feloniously and maliciously starts 'a chain reaction' of acts dangerous to human life must be held responsible for the natural fatal results of such acts. This is the doctrine enunciated by the textbook writers on criminal law, and which has been applied by the courts.

When men engaged in a scheme of robbery arm themselves with loaded revolvers they show that they expect to encounter forcible opposition and that to overcome it they are prepared to kill anyone who stands in their way. If in the course of their felonious enterprise they open deadly fire upon policemen or others and if in self-defense and to vindicate the law the fire is returned and someone is killed by a bullet fired in the exchange of shots, who can challenge the conclusion that the *proximate cause* of the killing was the malicious criminal action of the felons? No *other* genesis can justly be assigned to the homicide. The felons should be adjudged guilty of murder in the perpetration of a robbery, that is, murder in the first degree. As President Judge King said 105 years ago in *Commonwealth v. Hare*, supra: 'Such we believe to be the law, founded on the plainest reason, justified by the clearest expediency, and demanded by the most obvious necessity.' That was the correct conclusion also reached by the court below in the instant case."

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Surely, the decisions cited therein dispose of the contention of counsel for petitioner that this principle of law was invoked especially for this petitioner, who was a "cop-

killer." He is a wise, desperate and vicious criminal, wise in the law, and he took his chances as an armed robber together with the others, knowing full well the penalty he should have to pay, should death result.

The Criminal Code of the Commonwealth of Pennsylvania, enacted June 24, 1939, P. L. 872, followed the old code contained in the Act of 1860, and is as follows:

> "Section 701. *Murder of the first and second degree.* All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary or kidnapping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder in the first or second degree. If such person is convicted by confession, the Court shall proceed, by examination of witnesses, to determine the degree of the crime and to give sentence accordingly.
>
> "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. The Court shall impose the sentence so fixed, as in other cases. In cases of pleas of guilty, the Court, where it determines the crime to be murder in the first degree, shall, at its discretion, impose sentence of death or imprisonment for life. * * *"

ANSWER TO PETITIONER'S CONTENTION THAT A .38 CALIBRE BULLET MAY HAVE CAUSED THE DEATH OF OFFICER INGLING.

Under the law of the Commonwealth of Pennsylvania, heretofore cited, the finding of an unidentifiable, spent .38 bullet, is irrelevant and immaterial. The mere fact that there was such evidence in the trial of James Francis Smith, after this petitioner, Almeida, had been tried and found guilty of murder in the first degree with the death penalty, is of no moment. Smith was also wounded in the melee. The testimony of Dr. William S. Wadsworth, the Coroner's physician, who performed the autopsy upon Officer Ingling's body (R. 10a) is to the effect that he is unable to tell what sized bullet inflicted the wound in Officer Ingling's head that resulted in his death. Therefore, whether the blood on the spent bullet was that of Ingling or that of Smith is open to conjecture. Even if it had been produced at the petitioner's trial, it could not possibly have had any *legitimate* influence on the outcome. Three desperate men, Hough, this petitioner Almeida, and Smith, the first two armed one with a .45 calibre automatic and the other with a "horse pistol," and Smith with a .22 calibre pistol, engaged in this anti-social, vicious and desperate robbery, during the consummation of which, a human life was taken. There may be some doubt as to the accuracy of the testimony of Mrs. Ingling, the widow, and that of her two children, Jean and Leon, to the effect that Smith fired the fatal bullet. There is strong conjecture that this petitioner, Almeida, himself fired the fatal shot. His own confederate, Hough, who had previously plead guilty and who had been sentenced to first degree murder, with the death penalty, testified positively and unequivocally at the trial of this petitioner that he, Almeida, was the assassin. Therefore, your respondent is constrained to ask "suppression"? Suppression of what? Surely this .38 calibre bullet found on the

street has nothing to do with the guilt or innocence of these men, particularly of this petitioner. The secrets of the jury room are not open to counsel for the Commonwealth and to counsel for the petitioner. What factors caused one jury to fix the penalty at death in the Almeida case and the other jury at life imprisonment in the Smith case, are not known nor can they be known.

This petitioner's trial was had in accordance with the long-established law and procedure of the Commonwealth of Pennsylvania. As was so well stated by Chief Justice Maxey of the Supreme Court of Pennsylvania in the case of the Commonwealth vs. William Chavis, alias Wilburn Chambers, 357 Pa. 158 (1947), wherein a petition for certiorari was denied by your Honorable Court at p. 169:

> "There is seldom any criminal or civil trial of any magnitude or duration into the record of which some irrelevant, incompetent and immaterial testimony does not 'creep.'"

DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Your Honorable Court decided many years ago in the case of *Straudder vs. West Virginia*, 100 U. S. 303, as follows:

> To give the Supreme Court of the United States jurisdiction there must be a denial or inability resulting from the Constitution or laws of a State. The sufficiency of the evidence in a criminal case is not a Federal question.

And further, in *Walker vs. Sauvinet*, 92 U. S. 90:

> A party is not deprived of his liberty without due process of law if the trial is had according to the settled course of judicial proceeding.

In the case of *Frank vs. Magnum*, 237 U. S., 309, 326, 35 S. Ct. 582, 59 L. ed., 969, it was said:

> It is perfectly well-settled that the criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceeding as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.

And this case went on further to say:

> Where an appeal is given in criminal prosecution, in determining whether defendant has been convicted without due process of law, proceedings in the appellate courts as well as proceedings in the trial court must be considered.

And your Honorable Court has gone on further to say:

> No particular form of procedure is required. (GARLAND vs. WASHINGTON, 232 U. S. 642).
>
> And where the conditions just enumerated are fulfilled, there is no violation of the guarantee of due process of law. (PICO vs. U. S., 228 U. S. 225.)

In KRUG, 79 Fed. 308, it was said:

> The law by which the question of due process is determined is the law of the jurisdiction where the offense was committed and the trial is had.

Indeed, in MAXWELL vs. DOW, 176 U. S. 581, it was said:

> Within constitutional limits, the State and Federal Governments have full control over criminal procedure

within their respective jurisdictions * * * when the complaint is merely that a State Court has erroneously decided the facts of the case, all the proceedings before it being regular and sufficient, no claim of a denial of due process can be set up. (FRANKLIN vs. SOUTH CAROLINA, 218 U. S. 161.)

CONCLUSION.

The petitioner in this case was afforded every legal right and opportunity. He was tried in accordance with the long-established criminal procedure of the Courts of Oyer and Terminer of the Commonwealth of Pennsylvania. He had court-appointed counsel and their allegation that they had insufficient time to prepare a defense is incorrect. They were appointed on May 4, 1948, and the trial started on June 1, 1948. The fact that they may or may not have dissipated their efforts in trial preparation because they presented petitions for changes of venue to the lower and the appellate courts which were denied, is of no importance. They had twenty-six days within which to prepare.

Counsel for petitioner complain that the Supreme Court of Pennsylvania in seventeen thousand words did not mention the alleged "suppression" of the fact that a .38 calibre bullet of doubtful origin was found on the street, with either the blood of Smith or Officer Ingling thereon. A petition for a re-argument was likewise refused. A reading of the decision indicates that the appellate court deemed this fact irrelevant and immaterial. For the purpose of informing your Honorable Court of the immaterial and irrelevant nature of this testimony, respondent attaches hereto, in full, as an appendix, first, the testimony of Dr. William S. Wadsworth, the Coroner's physician, given at the trial of this petitioner, and at the trial of James Francis Smith, concerning the cause of death and the type of missile which caused his death, to the effect that he was unable to tell

from the wound in the officer's head the calibre of the bullet. And second, the testimony of Lieutenant George R. Spangler, given at the trial of this petitioner's accomplice, James Francis Smith.

Counsel for petitioner, on page 16 of their Petition, have said:

> "Certainly, foul blows were struck in this case. And they will continue to be rained upon criminal defendants in Pennsylvania unless this Court acts favorably to petitioner here."

That is strong language, particularly in view of the long line of decisions of the Supreme Court of Pennsylvania, notably in the case of COMMONWEALTH vs. KAISER, 184 Pa. 493 (1898), where Mr. Justice Mitchell, at page 498, used the following language, which was affirmed by Mr. Justice Kephart in COMMONWEALTH vs. LAWRENCE, 282 Pa. 128 (1925) p. 134, as follows:

> "This Court recognizes, and always will fully recognize, the importance of preserving the technical rules of evidence and of legal procedure. They are the safeguards which the law has placed around the innocent, and the Court will not be indulgent to a disregard of them or even to loose practice where it imperils substantial rights. But on the other hand such safeguards will not be allowed to be perverted into devices to defeat justice, and this Court has set its face resolutely against trifling objections that raise no point of any real bearing on the fact of guilt or innocence. As said by the present Chief Justice in COMMONWEALTH vs. JONGRAFF, 181 Pa. 172, 'Subtle distinctions that mark no substantial differences, and that do not affect the merits of a controversy unless it may be to obscure or defeat them, should not be allowed to thwart justice in the interests of disorder and crime.' "

And in these days when crime is upon the increase, when desperate men armed to the teeth, terrorize, rob and murder law-abiding citizens, how true are the words of Mr. Chief Justice vonMoschzisker, in the case of COMMONWEALTH vs. MELLOR, 294 Pa. 339 (1928), at page 345 thereof, affirming what was said by him previously in the case of the COMMONWEALTH vs. PARKER, 294 Pa. 144, 154 (1928):

> "The Act of 1925 was not passed to help habitual criminals, and we take judicial knowledge of the fact that offenders of that designation have become so general that the law, not only lex scripta but non scripta, must advance to protect society against them."

And Mr. Justice Kephart aptly said in COMMONWEALTH vs. STERLING, 314 Pa. 76 (1934), at page 78 thereof:

> "The death penalty has been fixed by the Legislature in the belief that it not only protects society from the anti-social actions of the particular person condemned and punishes him as well, but that it is, in its imposition in each case, a deterrent to others who may contemplate injury to society."

In this petitioner's case, the death penalty was amply justified and properly imposed by a jury of his peers.

We respectfully request that the petition for certiorari be denied.

Respectfully submitted,

COLBERT C. McCLAIN,
Assistant District Attorney.
JOHN H. MAURER,
District Attorney,
Attorneys for Respondent.

FOOTNOTE 12 TO BE READ IN CONJUNCTION WITH REFERENCE TO THIS FOOTNOTE ON PAGE 42 OF THIS BRIEF.

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[12] Our decision in **Commonwealth v. Moyer and Commonwealth v. Byron,** supra, was reviewed in three legal publications. In 96 U. of Pa. L. R. (Dec., 1947), p. 280, the reviewer states that the "deterrent effect" of our decision "may prove to be very great." His assertion that "the objectives of tort and criminal law are so divergent, however, that such precedents cannot be used interchangeably without causing confusion in both fields of law, with consequent illogical and undesirable results" is at variance with the authoritative opinions expressed by Professor Beale and others, supra.

In 17 Fordham L. R. (Mar., 1948), p. 124, the reviewer says in re the **Moyer-Byron** case: "Since it appears that Pennsylvania's statutory definition of felony murder, . . . is essentially that existing today at common law, the common law principles of proximate cause should apply in the enforcement of the statute, which appears to contain nothing indicating a different legislative concept of felony murder." The reviewer points out that the New York statutory definition of felony murder differs from the corresponding Pennsylvania statutory definition, Section 1044 of the N. Y. Penal Law reading as follows: "The killing of a human being . . . is murder in the first degree, when committed: . . . **by a person** engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise. . . ." (Bold face supplied by reviewer.) He states that in a jurisdiction such as New York in which the definition of felony murder "differs from the common law definition of the crime, it is not surprising to find the decisions departing from the common law concept of what constitutes the proximate cause of the death. . . . The difference, therefore, between the Pennsylvania and the New York decisions on what appears to be similar facts, results not from conflicting fundamental theories of causation in crimes as from the discrepancy in the statutory definitions of felony murder, . . ."

In 22 Tulane L. R. (Dec. 1947), p. 326, the reviewer says in re the **Moyer-Byron** case: ". . . it is generally agreed that to constitute murder under the [felony murder] doctrine, the homicide must be a natural and reasonable consequence of the perpetration of the felony. . . . Since the factual situation of the instant case [Moyer-Byron] falls within the broad requirements given above, it would appear that the court was justified in extending the doctrine to the case where the fatal shot was fired by the intended victim of the felons." The reviewer quotes the Louisiana statutory provision that murder results ". . . when the offender is engaged in . . . armed robbery . . . even though he has no intent to kill." (La. Criminal Code of 1942, Art. 30(2).) The reviewer then says: "Applying the rule of construction embodied in Article 3 to the instant case, which in Louisiana would arise under Article 30, it is submitted that the court should reach a result substantially the same as that of the instant case [Com. v. Moyer and Byron]."

TABLE OF CONTENTS OF APPENDIX

EXHIBIT A. TESTIMONY OF DR. WILLIAM S. WADSWORTH IN RE COMMONWEALTH VS. DAVID ALMEIDA, JUNE 3, 1948 AS OF MARCH SESSIONS 1947 NO. 1282, BEFORE JUDGE VINCENT A. CARROLL AND JURY:

	D.	C.
Dr. William S. Wadsworth	1a	2a

EXHIBIT B. TESTIMONY OF DR. WILLIAM S. WADSWORTH IN RE COMMONWEALTH VS. JAMES SMITH, JUNE 16, 1948 AS OF MARCH SESSIONS 1947, NO. 1282, BEFORE JUDGE BYRON A. MILNER AND JURY:

	D.	C.
William S. Wadsworth	7a	8a

EXHIBIT C. TESTIMONY OF LIEUTENANT GEORGE R. SPANGLER IN RE COMMONWEALTH VS. JAMES SMITH, JUNE 17, 18, 1948, AS OF MARCH SESSIONS 1947, NO. 1282, BEFORE JUDGE BYRON A. MILNER AND JURY:

	D.	C.	RE-D.
George R. Spangler	13a	26a	45a

Appendix

EXHIBIT A.

Testimony of Dr. William S. Wadsworth in re Commonwealth vs. David Almeida, June 3, 1948 as of March Sessions 1947, No. 1282, before Judge Vincent A. Carroll and Jury.

DR. WILLIAM S. WADSWORTH, sworn.

BY MR. LIPSCHUTZ:

Q. Dr. Wadsworth, you are the Coroner's physician, are you not?

A. Yes, sir.

Q. Did you perform a post-mortem examination upon one Cecil Ingling?

A. I did.

Q. When and where was that examination?

A. At the City Morgue.

Q. When?

A. The 31st of January, 1947.

Q. The body was identified by whom?

A. The two previous witnesses.

Q. Will you please tell us just what you found, and after you have done that tell us the cause of death?

A. The essential injuries in the case: a gunshot wound on the right side of the head about one-half an inch in front of, and about four and a half inches above the right ear, roughly at a point indicated by the tip of my finger.

Q. That would be on the right side near what bone?

A. Near the edge of the frontal parietal—the bullet having passed to the left and out on the left side of the head,

the brain having been destroyed by the bullet. Cause of death, gunshot wound of the head—the brain.

Q. Did you examine the cheek and the left shoulder of the deceased?

A. There was a bruise on the left cheek and an area of discoloration, and bruising above the left eye, and a minor bruise back of the shoulder.

Q. Did you examine the left upper lid of the deceased?

A. That was apparently associated with the condition of the brow; that is, some seepage of the blood there.

Q. Would you call that a secondary condition?

A. Yes.

Q. What was the cause of death?

A. A gunshot wound of the brain.

CROSS-EXAMINATION.

BY MR. ADAMS:

Q. When you examined Officer Ingling, there was no bullet in his head at that time, was there?

A. It had passed out before.

Q. From the examination of the wound, are you able to tell us approximately from what direction that bullet must have come?

A. It certainly must have come from the right side.

Q. Can you show us by your hand graphically approximately what you mean?

A. I have indicated already the point of entrance.

Q. It was above the ear. Then it came out that way?

A. Roughly. I cannot be accurate within a half inch, but that was the general way.

Q. Dr. Wadsworth, would you be able to say approximately what caliber bullet must have caused the wound?

A. All I can say is that the wound of entrance was 10 millimeters.

Q. You are not able to say what caliber the weapon was?

A. Probably the bullet was less than that, but not much less. I cannot state positively as to the exact caliber.

Q. Would you be able to tell us, Dr. Wadsworth, whether a .38 caliber bullet would make that sort of wound you have described?

A. I have found instances where a .38 has produced it, and I have found cases where a smaller bullet has produced it—or a larger one. The hole of entrance varies under different circumstances, so it is not easy to make a determination of the caliber of the bullet too closely on the wound of entry.

Q. Is there any way from your examination of the wound that you could determine absolutely how far the gun which shot that bullet was from the deceased?

A. There was no evidence which would warrant me in making such a conclusion.

Q. In your examination of the deceased, could you give us approximately the dimensions of the wound at the point of exit?

A. Well, a ragged wound of exit is rather hard to measure, and such a measurement would be of very questionable value.

Q. Would you be able from your examination of the wound at the point of exit to say what caliber bullet that might have been?

A. That would be a very much less useful basis for determination than the wound of entrance.

Q. From your examination of both the wound at the point of entry and the wound at the place of exit, could you say what caliber bullet that must have been?

A. I would only be making a rough estimate and a guess, and I would prefer not to do so under the circumstances, as I have already explained.

Q. Have you ever seen a wound such as that inflicted by a .38 caliber bullet?

A. I think I have said that I have seen such a wound or a similar wound.

Q. Are you familiar with the type of gun police officers usually carry?

A. Well, I have seen a good many types carried by police officers at various times.

Q. I mean the regulation gun that they carry at the present time.

A. I don't know exactly what the regulation gun at the present moment is.

Q. Do you or not know that the regulation gun that police officers use carry .38 caliber bullets?

A. I have seen a great many police guns that carry .38 caliber bullets, but what the regulation is at the present moment, as I said before, I don't know.

Q. You have examined a great many deaths of this sort, have you not?

A. By this sort, what do you mean?

Q. Inflicted by bullets.

A. Gunshot wounds?

Q. Yes.

A. I have.

MR. ADAMS: That is all.

BY THE COURT:

Q. Was there any evidence of powder at the point of entrance?

A. No.

Q. What would that mean as far as distance was concerned, distance of the muzzle of the gun from the point of entry of the bullet?

A. Depending upon the caliber; it would depend upon the caliber, the charge, the length of the barrel, and a number of circumstances, and it depends on the circumstances how far the powder will go.

Q. Considering all the types of ammunition that are commonly in use and the different calibers of guns—.22, .32, .38, and .45 caliber—could you give a minimum distance the gun must have been fired from?

A. I should say over three feet would be the minimum.

Q. In other words, it could not have been fired within three feet without some evidence on the victim?

A. There should have been, but I cannot state it positively.

Q. You cannot state it as an incontrovertible fact or conclusion, but you would say three feet, considering all those calibers, considering all general types of guns, that that would be fired from certainly three feet or more away, or otherwise there would have been evidence at the point of entrance?

A. It is probable.

BY MR. ADAMS:

Q. Is this a true statement in general: that the further away a gun is that fires a bullet at an individual, the less chance there is of finding powder marks on the person hit?

A. Well, within a certain limit, the further away you are the more marked it is, and then beyond that it diminishes.

Q. The point is, if I were two feet from you and fired a gun at you, there is more chance of there being powder marks from the shot than if I were 10 feet and fired a gun; is that correct?

A. Yes; but if you are close there is less dissemination of powder, less than if you were a little further away, but if you pass beyond the limit, then beyond that limit it becomes less and less.

Q. Let me reframe my question. Suppose I fire a gun at you and I am two feet away. In all probability that would cause a powder mark. Now, is there more probability that that powder mark would still appear on you as I walk away from you and fire or is there less probability?

A. At two feet you are put beyond the first phase. Therefore, the further away you are the less likelihood you are to find a mass effect, but there may be a disseminated scattering, a bunch of powder grains, which may be evidence of it being a little further away than if in a smaller or more compacted area.

Q. If a gun were fired at approximately 15 feet from the individual who was hit by the bullet, would there be powder marks on the victim?

A. I don't think that would be possible.

Q. That could not be possible?

A. There might be powder from the bullet but not from the transmission of the projected powder.

MR. ADAMS: That is all.

EXHIBIT B.

Testimony of Dr. William S. Wadsworth in re Commonwealth vs. James Smith, June 16, 1948 as of March Sessions 1947, No. 1282, before Judge Byron A. Milner and Jury.

WILLIAM S. WADSWORTH, sworn.

BY MR. LIPSCHUTZ:

Q. Doctor Wadsworth you are a practicing physician and also the coroner's physician for some years, is that correct?

A. Yes.

Q. Did you perform a post mortem examination on the body of one Cecil Ingling?

A. I did.

Q. Will you please tell His Honor and the members of the jury when and where you performed the post mortem examination, just what you found, and what was the cause of death?

A. I made the post mortem on the 31st of January, 1947, at the city morgue. The essential feature in the case was a gunshot wound above and slightly in front of the right ear, the bullet having passed to the left and out on the left side of the head, and having destroyed the brain. The cause of death was a gunshot wound of the brain.

Q. Did you find anything else, Doctor Wadsworth?

A. Nothing of interpretive significance.

Q. What was the cause of death?

A. Gunshot wound of the brain.

Q. Gunshot wound, singular?

A. Yes.

MR. LIPSCHUTZ: Cross-examine.

CROSS-EXAMINATION.

BY MR. McBRIDE:

Q. Doctor Wadsworth, will you please tell us the distance of the wound of entrance from the whole of the right ear?

A. It was about four and a half inches above and a half inch in front.

Q. On the right side?

A. Yes.

Q. In its passage from the right side to the left did it, as you ascertained from your examination, strike any hard substance that might have deflected its course?

A. It had to pass through both sides of the skull, giving it practically a perpendicular contact.

Q. It did travel then perpendicularly across the head?

A. Almost—very slightly.

Q. Pardon me, perpendicular, it would be horizontal, wouldn't it?

A. Well, perpendicular to the surface of the bone.

Q. Will you tell us the position of the wound of exit from the whole of the left ear?

A. About the same height and a trace off the direct line.

Q. Forward or backward?

A. My recollection is forward, but, just a moment until I see the diagram.

Q. Yes.

A. A trace forward.

Q. A trace forward?

A. Yes.

Q. So that assuming an upright position as I am now standing, the bullet's path would be directly horizontal, isn't that right?

A. Right, provided the head was in the position in which the line between each ears are.

Q. Yes. When you say a trace forward do you mean

something about a quarter inch or less than half an inch, something like that?

A. I can't make it with less than a fraction of an inch off because the measurement has no basis for exact measurement without very extensive fixation, but not over half an inch to the front.

Q. Doctor Wadsworth, did you fix the size of the wound of entrance?

A. Ten millimeters.

Q. Will you tell us whether it was a round wound or lop-sided or contused, if you can describe it to us in those terms?

A. Well, I would say it was an ordinary type of wound of entrance, that is, it showed certain rubbing and naturally it was contused and punctured.

Q. When you say that the size of the wound was ten millimeters, does that mean circumference or diameter?

A. Diameter.

Q. I assume you did that with your instruments, you took that size?

A. A cone graduate penetrated until the line was practically at the ten millimeter line.

Q. Did you take the size of the wound of exit?

A. That would be rather a vague measurement because of the ragged edge, and the exact hole of the exit of the bullet was modified by the splits of the tissue on the side. It is rather difficult to get an accurate measurement of that wound.

Q. Could you say whether or not it was larger or smaller than the wound of entrance?

A. The ragged wound of exit is usually somewhat larger and in this case was.

Q. Doctor Wadsworth, is there a minimum distance upon which powder marks will show either upon the body or clothing?

A. That is somewhat variable and varies with each weapon and varies with each charge so that it becomes rather vague and not very valuable except in cases where

the weapon has been carefully tested in relation to charge and position.

Q. When you say charge you mean the size and character of the powder?

A. Ammunition.

Q. Powder?

A. Ammunition.

Q. Were there any powder marks upon the head of Officer Ingling?

A. No.

Q. Were there any upon his clothing?

A. I didn't see any.

MR. LIPSCHUTZ: I didn't hear that, Doctor.

THE WITNESS: I didn't see any.

Q. Now, from the point at which the bullet entered the head to the point at which it went out of his head was there any deflection?

A. Well, the line and the condition of the wounds in the bone and the skin gave no evidence of any marked deflection. A contact at practically right angles to the surface is less likely to have deflection than at a different angle of incidence.

Q. How tall was Officer Ingling, Doctor Wadsworth?

A. I don't remember whether I made measurements but he was a large, well developed, muscular fellow in excellent condition.

Q. You do not have anything on your notes to indicate anything in terms of feet and inches, do you?

A. No. He was large, well developed and a good conditioned man but I didn't measure in detail the size of the body. Being a policeman, I supposed that would be on the record.

Q. Yes, I think we can get it elsewhere, I just wondered if you had a note.

A. No, I took for granted, being a policeman, he would have been measured.

MR. McBRIDE: I think that is all.

BY MR. LIPSCHUTZ:

Q. Doctor Wadsworth, may I ask you one or two questions. Am I correct when I ask you whether it was not the 31st of January you performed your post mortem examination?

MR. McBRIDE: I think that is what he said.

MR. LIPSCHUTZ: Just a minute.

A. That is what I said, that is correct.
Q. At that time did you have any knowledge as to where Officer Ingling was standing or where the shot came from? Did you have any information at that time?
A. The only information I had was he had been shot and was a police officer.
Q. Was that the only information you had?
A. I had no detailed information at that time.

MR. LIPSCHUTZ: That is all.

BY THE COURT:

Q. How long have you been the coroner's physician?
A. For Forty-odd years.
Q. Forty years?
A. For forty-odd years.

THE COURT: That is all.

MR. LIPSCHUTZ: Do you want him anymore?

MR. McBRIDE: No.

MR. LIPSCHUTZ: Your Honor does not want the doctor anymore?

THE COURT: No.

MR. LIPSCHUTZ: You may go, Doctor.

EXHIBIT C.

Testimony of Lieutenant George R. Spangler in re Commonwealth vs. James Smith, June 17, 18, 1948, as of March Sessions 1947, No. 1282, before Judge Byron A. Milner and Jury.

GEORGE R. SPANGLER, sworn.

BY MR. LIPSCHUTZ:

Q. George R. Spangler, you are a lieutenant in the detective bureau, are you not?
A. That is right.
Q. You are a ballistics expert?
A. Well, I do firearms identification.

MR. LIPSCHUTZ: I will agree if you will on that.

MR. McBRIDE: I certainly will.

MR. LIPSCHUTZ: That he is thoroughly competent. That can go on the record.

BY MR. LIPSCHUTZ:

Q. How long have you been familiar with firearms and the peculiarities of bullets and the calibre of revolvers and guns?
A. Before I entered the Bureau of Police, and that is close to ——
Q. How long have you been there?
A. Thirty-two years.
Q. In the event, Lieutenant, that a bullet is shot, say at the Acme Market, 20th and Fairmount avenue, shot into

the ceiling, and you had that spent bullet and you did not have the revolver from which the bullet came, would that be of any value to you, a spent bullet?

MR. McBRIDE: That is objected to, sir, that is not even an expert's question, that is just an attempt to scotch any cross-examination.

THE COURT: I know, but I think it is a pertinent question.

MR. McBRIDE: It practically decides the case. It is not even a question.

MR. LIPSCHUTZ: Now, it does not decide the case and my friend knows it. My friend asked and made a lot of ado about whether a spent bullet was found, and where, and took down the names, and now I am asking the expert, and we both agree he is an expert in ballistics, whether that would have been of any value to him if he didn't have the revolver.

MR. McBRIDE: Let me ask him.

MR. LIPSCHUTZ: He is my witness. You asked me to call him.

THE COURT: You will have him in cross-examination.

MR. McBRIDE: I object to that question. That just brings in the world.

THE COURT: The objection is overruled.

(An exception was noted for the defendant.)

BY MR. LIPSCHUTZ:

Q. Can you answer that?
A. I will make an effort.
Q. I know you will. Go ahead.
A. The only value it would have would be as to the calibre of the gun having fired the same.
Q. Could you tell the peculiarities, or, using the ballistic term, the eccentricities of that gun by examining the bullet?
A. Yes.
Q. You could tell?
A. Yes.
Q. Now, let me ask you this: is that a .22 calibre gun?
A. A .22 calibre long.
Q. Would you call that a deadly weapon?
A. I would.
Q. Would it be correct if I would state that could kill at a half mile?

MR. McBRIDE: That is objected to. I do not think he ought to lead the witness, I don't think he should state anything.

MR. LIPSCHUTZ: I will withdraw it and ask him.

(The question was not answered.)

Q. If this pistol were fired directly at an individual who was half a mile away from the individual who fired the gun, a bullet from this .22 calibre gun, and that bullet hit a vital spot, could it produce a mortal wound?
A. It could be fatal.
Q. And produce death?
A. Sir?
Q. When you say fatal ——
A. I said fatal, it could be fatal.

Q. Now, Lieutenant, was this particular gun handed to you for examination?

A. That is right.

Q. Did you examine that gun?

A. I received that gun on January 30, 1947.

Q. At about what hour?

A. Ten o'clock at night.

Q. What type of examination did you give that?

A. It was just a superficial preliminary examination at that particular time.

Q. Did you examine it later for any specific purpose?

A. I did.

Q. When?

A. That was after the 31st, we again received it from Officer Fox from the 9th police district on the 31st of January 1947.

Q. Could you tell at the time, the last time that you examined it, not superficially, whether that gun there that you refer to was recently fired?

A. I said at that time and I do say yet that it had been fired recently but not very recently.

Q. What do you mean by not very recently?

A. Recent, I would not say very recently. I examined it preliminarily approximately four and a half hours after its confiscation and had it been fired very, very recently there should have still been the odor prevalant of smokeless powder.

Q. Would you have to know the character of the powder used to determine whether there would be that odor you would expect?

A. You would only find smokeless powder used in that type gun.

Q. You would only find smokeless powder used in that type gun?

A. Yes.

Q. Is there just one type of smokeless powder?

A. No, indeed.

Q. You say you gave it a superficial examination; when was that?

A. That was on the evening of January 30. I had it about five or ten minutes.

Q. How long after five-thirty or six was it, how many hours?

A. I received the gun from Officer Fox on the 30th at ten p. m., and that is approximately four and a half hours after.

Q. Suppose that gun was fired on the 30th of January of last year between five-thirty and six-thirty, as you say, with smokeless powder, would you have been able to tell if you had examined it whether it was recently fired, say three or four hours before?

A. No.

Q. You would not?

A. In other words, you have to determine that, in a weapon of this type, even if it was exposed to the atmosphere, it should hold the aroma of smokeless powder up to eight to ten hours.

Q. Did you try to discover whether there was an aroma present?

A. It wasn't at that time.

BY THE COURT:

Q. I think you misunderstood Mr. Lipschutz's question.

A. Well ——

THE COURT: Mr. Wright, will you read back those questions and answers.

MR. LIPSCHUTZ: I think Your Honor is correct. I think inadvertently he did.

(The questions and answers referred to were repeated by the reporter as follows:

"Q. Suppose that gun was fired on the 30th of January of last year between five-thirty and six-thirty, as you say, with smokeless powder, would you have been able to tell if you had examined it whether it was recently fired, say three or four hours before?

A. No.

Q. You would not?

A. In other words, you have to determine that, in a weapon of this type, even if it was exposed to the atmosphere, it should hold the aroma of smokeless powder up to eight to ten hours."

MR. LIPSCHUTZ: That is your answer?

THE WITNESS: If that had been fired three or four hours prior to my examination I would have been definitely able to tell.

THE COURT: Therefore you misunderstood the question.

MR. LIPSCHUTZ: I think he did, in fairness to Lieutenant Spangler, and I will agree that that first answer be stricken out, and this last answer, that is your answer, is it not?

THE WITNESS: Yes.

BY MR. LIPSCHUTZ:

Q. Did you examine any spent bullets?

A. I did examine several, yes.

Q. Do you know what calibre those bullets were?

A. I examined several .38 S & W special bullets and also a forty ——

Q. For the benefit of the jury, what kind of revolver would those bullets be used in?

A. The specimens that were submitted to me for examination were exceptionally poor specimens. In other words, you could determine the make of the gun but I would be unable to make a positive identification of the revolver having fired that particular bullet.

Q. And also, and if I am wrong you correct me, you would have difficulty fixing the calibre too, wouldn't you?

A. I could fix the calibre.

Q. With certainty?

A. Well, I had several parts, what I would not call a bullet, it was merely fragments of bullets.

Q. Wouldn't there be uncertainty in your mind as to the calibre from the condition in which you found those bullets?

A. Just as I remarked, on fragments, if I have fragments I could not tell if it was from a .45 or .38, merely pieces of lead.

Q. Do you know where those pieces of lead were obtained?

A. There were several I recovered.

MR. McBRIDE: May it please the court, may I just respectfully suggest that since there are a number he is talking about that we have them produced here and that we first have testimony as to where each was found, then I think both of us can question and examine the lieutenant with a greater degree of accuracy. My questions alone may well take up much beyond the period of four-thirty. I am perfectly willing to go on but I think it would be hearsay for the lieutenant to testify now.

THE COURT: I agree with you thoroughly on that. Do you have witnesses who can identify the bullets now?

MR. LIPSCHUTZ: What?

THE COURT: Do you have witnesses who can identify the bullets now?

MR. LIPSCHUTZ: He was just about to make a statement.

THE WITNESS: I don't know whether I got them or not.

BY MR. LIPSCHUTZ:

Q. Where did you get those bullets you referred to, or fragments?
A. I recovered them from the automobile.

BY THE COURT:

Q. You yourself did that?
A. Yes.

MR. LIPSCHUTZ: Sure.

MR. McBRIDE: There are others he didn't. Let us go ahead with them.

BY MR. LIPSCHUTZ:

Q. The ones you found yourself, where did you find them?
A. In the automobile that was supposed to have been used in the holdup.
Q. Is that a picture of the car where you found those fragments of bullets?
A. That is it.

BY THE COURT:

Q. He has shown you a picture of the car you saw up there?

A. Yes.

MR. LIPSCHUTZ: Yes, Commonwealth's Exhibit 1.

BY MR. LIPSCHUTZ:

Q. What was the condition of that fragment that you found?

A. Well, there was two bullets of .38 S & W special calibre and two minor fragments, that means they were originally parts of bullets which I could not further identify.

Q. Where did you find the fragments in that blue car?

A. Well, there was—I would have to refer to my notes.

THE COURT: You may.

THE WITNESS: "Bullet recovered from bottom of left hand door between metal and upholstery."

Then I go on to describe the bullet.

BY MR. LIPSCHUTZ:

Q. When you say the "left hand door," do you mean the door where the steering wheel is?

A. That is right, the left hand door.

Q. Will you describe the condition of that bullet that you call a fragment of a bullet?

A. A bullet badly mutilated and distorted. Approximately one-third of bullet circumference somewhat flattened and sheared from nose to base. Class characteristics indicate bullet had been fired from a revolver with right hand rifling. Specimen in very poor condition for compara-

tive purposes. In other words, when I say in poor condition, that means that I could not positively identify the particular gun that fired that bullet.

BY THE COURT:

Q. But you knew the calibre of it?

A. Oh, yes, I can tell that by the contour and weight of the bullet and the markings. That is the class characteristics that were left on there by the grooves and lands in that particular barrel, but as to identifying the gun, it would have been impossible.

Q. What was the calibre?

A. A .38 special. We know it as a .38 S. & W. special; we merely say .38 because there are cartridges that would not chamber in that gun.

BY MR. LIPSCHUTZ:

Q. When you say an S. & W., that is Smith and Wesson?

A. No, that is merely distinguishing a particular cartridge.

Q. Suppose I gave you a multiplicity of guns with .38 calibre that were shot, you could not tell whether that bullet was ever in that chamber, could you?

A. Not in that condition.

Q. In the condition of the bullet you found in the left hand side, could you tell me whether the condition of that bullet would be in such shape if it had hit a human being from the right over the left eye?

MR. McBRIDE: That is objected to.

MR. LIPSCHUTZ: First he can tell me whether he could.

MR. McBRIDE: The lieutenant is not qualified as a physician or doctor. He is testifying here about bullets that he sees. I think he will agree himself he does not feel he is competent to answer that question.

MR. LIPSCHUTZ: Please don't put words in his mouth.

BY THE COURT:

Q. If it had gone through bone, a layer of bone such as the skull, would you be able to tell?
A. Well, at times there would be particles of bone adhering to the bullet, which I didn't find.

BY MR. LIPSCHUTZ:

Q. Did you find anything that was red in the particles which you found near the steering wheel?
A. No.

THE COURT: What do you mean by red?

MR. LIPSCHUTZ: Red, which would be as blood would be.

THE COURT: If you mean blood, say blood.

MR. LIPSCHUTZ: He would not know whether it was blood.

THE WITNESS: I am not qualified to determine that.

Q. Are you familiar with bullets striking and grazing the skull, not penetrating, but leaving quite an unusual mark over the left eye?

A. Yes, I just had a recent case last Friday similar to that.

Q. Then from your past experience could you say that if a bullet fired into that blue car, with an individual sitting near the steering gear, and he had quite a mark up over the left eye, could you say that a bullet caused that mark?

MR. McBRIDE: Which bullet?

MR. LIPSCHUTZ: Any one of those he found in the vicinity of the steering wheel.

Q. (Continued.) Can you answer that, Lieutenant?

A. Well, the bullets that I recovered from that car would not or did not, in my opinion, appear that they had struck. In this particular bullet that I am referring to now, in fact, this is an opinion that the few fragments and the two bullets recovered from the car, there was no evidence to indicate they had come in contact with other than metal and upholstery.

Q. That is your final opinion, is it?

A. Yes.

Q. Of course you never had an opportunity to see the individual?

A. No.

Q. Alleged to have been in the vicinity of the wheel?

A. No.

Q. Without that you could not arrive at an opinion?

A. No. I had seen no wounds.

MR. LIPSCHUTZ: Do you want to start cross-examining?

MR. McBRIDE: Are you turning him over?

MR. LIPSCHUTZ: Yes.

MR. McBRIDE: Does Your Honor want me to start now?

THE COURT: We are going to adjourn at four-thirty.

MR. McBRIDE: I would like to do it all at once. I want to go into this whole problem just as deeply as I can.

THE COURT: Very well, we will resume tomorrow morning.

MR. McBRIDE: Will Your Honor instruct the witness, and the witness will understand, that between now and tomorrow morning he is to talk to nobody about the case.

THE COURT: I have the greatest confidence in him.

MR. McBRIDE: That would not have been necessary.

THE COURT: We will adjourn.

(Adjourned to June 18, 1948, at ten a. m.)

Philadelphia, Pa., June 18, 1948.

(Fourth Day, Trial resumed.)

(Appearances as before noted.)

COMMONWEALTH'S EVIDENCE RESUMED.

GEORGE SPANGLER, previously sworn, resumed.

CROSS-EXAMINATION.

BY MR. McBRIDE:

Q. Lieutenant Spangler, how long have you been the ballistics expert of the Police Department?

A. For seventeen years.

Q. When did you first receive any guns or bullets that are involved in this particular case?

A. On January 31, 1947, I received the two firearms that are now in evidence.

Q. Am I incorrect in stating that you testified in answer to Mr. Lipschutz that you received at least the .45 calibre so-called automatic about four hours after five-thirty on January 30?

A. In fact I went to the 19th Police District at that time, at ten p. m. of January 30, and then examined the pistol at that time, that is, the .45 automatic.

Q. Did you also examine at that time the .22 revolver?

A. Not at that time.

Q. When you examined the .45, what examination did you make?

A. Merely superficial, that is as far as the powder folding and the condition of the barrel.

Q. That was to ascertain whether or not it had been recently fired?

A. Yes, sir, recently or very recently.

Q. What does recently mean, as you use the word?

A. It could mean two or three days, or even a week.

Q. What does the very recently mean, as you use the words?

A. If I would use that term, I would have to detect the odor of powder gases.

Q. Did you detect the odor of powder gases on that .45?

A. I didn't.

Q. Within what period does that mean the gun had not been fired?

A. Well, as a rule it would retain the odor of powder gases up to fifteen to eighteen hours, it all would depend as to the atmosphere and the condition it was kept under.

Q. It would certainly mean, would it not, that it had not been fired in six hours?

A. That is right.

Q. You say that is right?

A. Yes.

Q. Would you say then, that if Officer Waters testified that that gun had been fired at him by Edward Hough, your examination of that weapon does not support that statement?

MR. LIPSCHUTZ: I object to that, that is a matter of argument. He has said emphatically in his judgment it was not fired during that time.

THE COURT: I think that is right. I will sustain the objection.

BY THE COURT:

Q. In your judgment, Lieutenant Spangler, it had not been fired within six hours?

A. That is right.

BY MR. McBRIDE:

Q. As a matter of fact, in your judgment it had not been fired in twelve hours, had it?

A. I would not care to answer that for the simple reason it all depends on the conditions. Of course it would retain up to the length of time if you wrapped it up and continuously protected it from the atmosphere and from the elements.

Q. In any event, give us the precise time, if you can, at which you examined that automatic weapon for that purpose. What time was it that you smelled it and made that test?

A. It was at ten p. m.

Q. Ten p. m.?

A. That is right.

Q. When did you first see the .22 caliber weapon?

A. I received that on the morning of January 31, 1947, from Sergeant Kronkenberger.

Q. At what time?

MR. LIPSCHUTZ: Mr. McBride, to shorten this I said at the inception I have every confidence in my friend, and if he says that revolver was not shot at Waters, I will now agree to it.

(The last question was not answered.)

MR. McBRIDE: Do you say that that .22 ——

MR. LIPSCHUTZ: Do you mean the .45?

MR. McBRIDE: You said revolver. I think you mean —

MR. LIPSCHUTZ: The .45.

MR. McBRIDE: —the .45 automatic pistol.

MR. LIPSCHUTZ: The automatic pistol, you can amend that statement and put it on the record.

BY MR. McBRIDE:

Q. What time on the morning of the 31st of January did you receive for examination the .22 caliber revolver?
A. Approximately nine-thirty a. m.
Q. What examination did you make of that revolver?
A. To see the condition of it and the functioning of it, and whether or not it had been fired.
Q. Had it been fired?
A. Definitely not.
Q. Definitely not?
A. Yes.

MR. LIPSCHUTZ: Please don't repeat the answers.

MR. McBRIDE: Don't interrupt me. I do not want to emphasize any answer by repeating it, but I don't know whether the jury gets it. Maybe it will avoid it if you will be so kind as to speak up.

THE COURT: That is what Mr. Lipschutz objects to.

MR. LIPSCHUTZ: How cleverly he excuses himself.

THE COURT: He does not want any more emphasis on the testimony than the witness gives it; however, he has answered the question and it is not necessary to repeat it. The witness speaks in a low voice, you can ask him to repeat his answer.

MR. McBRIDE: I thought it was quicker if I repeated it, sir.

THE COURT: You are not the witness, you know.

MR. McBRIDE: That is right.

MR. LIPSCHUTZ: Presumptively.

THE COURT: Let us go on.

MR. LIPSCHUTZ: That is the intent, the way his questions are put.

MR. McBRIDE: Is there anything else you want to say to the jury, Mr. Lipschutz?

THE COURT: Let us go on.

BY MR. McBRIDE:

Q. Did you make a later examination of the .45 pistol?
A. I did.
Q. When?
A. The following day.
Q. When you say "the following day," do you mean the 31st of January?
A. That would be the 1st of February.
Q. That is Saturday; would that be right?
A. That is it.

Q. What examination did you make?

A. As to the functioning of the gun, and also took tests, test firings from the weapon itself.

Q. When you take test firings, what do you do?

A. Well, we retain them until such times that there may be possibly other evidence when those specimens come in for comparative purposes.

Q. Maybe you misunderstood me. Tell the Court and jury what you do in taking a test firing.

A. What do you mean?

Q. Do you mean you fire the weapon?

A. The physical end.

Q. Yes, do you load the weapon and fire it?

A. We fire it into cotton waste, and retrieve the bullets.

Q. You did that with how many bullets from that .45?

A. Two.

Q. Two?

A. Yes.

Q. Then you carefully preserve those .45 test bullets?

A. Until such time as we may get specimens as may warrant comparison.

MR. LIPSCHUTZ: Mr. McBride, I will also agree ——

MR. McBRIDE: I would prefer you didn't agree to anything. Can I ask the witness?

MR. LIPSCHUTZ: But I have agreed that his conclusion is correct. It may be very interesting but I don't see where it is necessary.

MR. McBRIDE: You will.

MR. LIPSCHUTZ: There is no contradiction of his conclusion, now why continue to show your knowledge of ballistics? I will agree.

MR. McBRIDE: That anything I ask him is so?

MR. LIPSCHUTZ: I could not do that.

MR. McBRIDE: Then why not keep quiet a while?

THE COURT: We are talking now about the .45 automatic.

MR. LIPSCHUTZ: Well, go on.

MR. McBRIDE: Am I not allowed to cross-examine him?

MR. LIPSCHUTZ: Except in the interest of time.

MR. McBRIDE: I am not interested in time, I am interested in trying this case as well as I can.

MR. LIPSCHUTZ: Go on, go on.

MR. McBRIDE: Your Honor, the tympanum of my ears is such that his roars disturb me.

THE COURT: Mr. Lipschutz, won't you subside?

MR. LIPSCHUTZ: I will let him go on and sit here complacently.

THE COURT: The witness will be turned over to you.

MR. LIPSCHUTZ: I only want to ask him one question.

THE COURT: Not now.

MR. LIPSCHUTZ: No.

BY MR. McBRIDE:

Q. Did you preserve those two test bullets?

A. I did.

Q. What was your purpose in firing it?

A. Well, at that particular time there wasn't as yet any spent bullets forwarded to the laboratory to make any comparisons.

Q. But in any event, your purpose in firing the two bullets was to note any markings on those bullets, so if you did later get bullets for comparison you could study those test bullets as against the bullets that were forwarded to you, to find out whether those bullets were fired from that weapon?

A. Yes.

BY THE COURT:

Q. Let me ask you, so the jury will know, each gun or revolver or pistol, the bore of it has characteristics, has it not?

A. Yes.

Q. It is somewhat like a man's thumb or anything else?

A. It is the same basic principle as finger printing, only we use the striations left in a revolver barrel that are placed in there when the grooves are cut in the barrel during the rifling process.

Q. When a projectile or bullet is fired from a gun, that leaves a distinguishing mark or marks upon the projectile?

A. Yes.

Q. You make the test firings to see what marks that bore makes on those bullets, and then when you get other bullets, you compare those, just as you would finger prints?

A. Yes.

Q. Is that right?

A. Yes.

THE COURT: Go on.

BY MR. McBRIDE:

Q. Did you thereafter receive from other members or from some other member of the police force some other .45 caliber bullets which had been fired inside the Acme Supermarket at 1924 Fairmount avenue on January 30, 1947, at five-thirty p. m. approximately?

A. I did.

Q. When did you receive these .45 caliber bullets, and from whom?

A. I received those on February 4, 1947, from Detective McGurk of the Homicide Division.

Q. How many were there?

A. There was one bullet intact, and there were several fragments.

Q. Did you make a comparison of that bullet with the .45 automatic weapon with the bone handle which is here?

A. I did.

Q. Can you say whether or not either of those bullets was fired from that weapon?

A. They were not.

Q. They were definitely, however, .45 caliber bullets, were they not?

A. That is right.

Q. They obviously could not have been and were not fired from a little .22?

A. Obviously not.

Q. So they were fired from some other .45 caliber weapon?

A. That is right.

Q. Do you have that weapon?

A. That has never been as yet recovered.

Q. So that we understand each other, the .45 caliber weapon which has not been recovered, is that the one that

Almeida is said to have fired inside the Acme Supermarket?

A. I don't know that.

MR. LIPSCHUTZ: I object to that.

THE COURT: He does not know.

MR. McBRIDE: What?

THE COURT: He does not know.

MR. McBRIDE: I think we agree on that.

MR. LIPSCHUTZ: I don't agree on anything, I got such fine treatment the last time.

MR. McBRIDE: All right, I think you are right on that.

THE COURT: Let me understand this: this weapon came, according to the testimony, from Hough, this .45 automatic?

MR. McBRIDE: That is the one we have, sir.

THE COURT: Yes.

MR. LIPSCHUTZ: As I understand it, it was thrown away by Hough.

THE COURT: There was no evidence he fired any weapon in the store.

MR. McBRIDE: I know.

THE COURT: So it would be the most natural thing

if that is true, then, that these bullets that were in the ceiling didn't come from that weapon.

MR. McBRIDE: We agree.

THE COURT: Because Almeida fired the weapon.

MR. McBRIDE: That is exactly what I am prying from him.

THE COURT: I know, but it seems without this expert testimony that is the testimony so far.

MR. McBRIDE: We are moving perhaps at a snail's pace, but if Your Honor is patient, it will all be made clear.

THE COURT: I will try to be patient.

BY MR. McBRIDE:

Q. Were you given any other bullets to examine?
A. Other than the .45?
Q. Yes.
A. I was.
Q. How many?
A. One.
Q. Who gave you that?
A. That was received in the laboratory February 1, 1947 by Detective Ahrndt of the 2nd Detective Division.
Q. Did you examine that one?
A. I did.
Q. What caliber was it?
A. It was a .38 S & W Special.
Q. Would that fit a police Special .38?
A. That is right.

Q. Did you examine that?

A. I did.

Q. Were you given any police weapon with which to attempt to connect that up?

A. That would be physically an impossibility for the simple reason that the individual characteristics were obliterated, which are so necessary to make a positive identification of a revolver having fired the same, it would have been an impossibility.

Q. Were you shown pistol No. 192042 belonging to Officer Waters?

A. I didn't examine any of those pistols.

Q. Then you did not examine Officer Water's, Officer Fox's or Officer McGinley's pistols?

A. I didn't.

Q. How many other bullets do you still have that were not brought to you by anyone else?

A. As I stated there yesterday, there was ——

THE COURT: Wait a minute. Were there any more than you have talked about?

THE WITNESS: Only parts of bullets.

BY THE COURT:

Q. You talked about two and fragments of one?

A. Yes.

Q. Were there any more?

A. No.

Q. Then that is the answer?

A. Yes.

MR. McBRIDE: There are some he got out of the car himself, sir.

BY MR. McBRIDE:

Q. Weren't there?
A. That is right.
Q. How many were there?
A. There was two and fragments.

BY THE COURT:

Q. Are they different ones from the ones you have talked about?
A. They are .38 ——
Q. Wait a minute, are those two you got from the car itself different bullets than the ones you have just testified to?
A. Well, they are different, they are .45, I testified as to a .45 caliber and I testified to a .38 special.
Q. I am asking you a simple question, are we now proceeding on some other bullets than you have just testified to?
A. No, .38 special.
Q. I thought those bullets, the bullet and fragment of bullet came from the ceiling of the place, not from the automobile, isn't that true?
A. That was a .45 caliber.
Q. That was a .45?
A. Yes.
Q. Then you had another bullet which was not in the ceiling but was apparently fired on the scene, on which the identification or characteristics were obliterated?
A. That is right.
Q. You could not make out anything about it except it was a .45 caliber, is that right?
A. The second bullet, where the characteristics were entirely obliterated, was a .38 S & W Special.
Q. A .38 S & W Special?

A. Yes, you are right. They are the bullets I got out of the automobile.

Q. Now we are on new bullets?

A. Some other bullets, that is entirely different.

Q. That is all I want to find out, these are other bullets that you got in the automobile?

A. In the abandoned automobile.

BY MR. McBRIDE:

Q. Who recovered them?

A. One of my assistants at the time.

Q. Let us take them one at a time. Where did he recover the first one?

A. Well ——

THE COURT: He got it in the door, he said, the left hand door at the bottom, between the upholstery of the door and the rail.

BY THE COURT:

Q. Is that right?

A. Yes.

BY MR. McBRIDE:

Q. Were they all there?

A. No.

THE COURT: No, one was there. I just want to save time because I remember it.

BY MR. McBRIDE:

Q. Treating that as the first one, was there any point you would describe as the point of entrance of that bullet?

A. Entrance into the car from the left side.

Q. From the left side?

A. Yes.

Q. What is your next one? You can refer to your notes.

A. It is rather hard to retain all that. Spent bullet recovered from right side front corner between upholstery and metal roof, slightly bulged due to impact of bullet. That is underneath the roof of the car.

Q. Where was the third one recovered? By the way, as to that second one, was there any point of entrance found in the car?

A. I will give you that in a minute. Bullet hole in left hand door entering eleven inches above handle. That was the first one. At bullet entrance, bullet hole in left center of metal auto body, two and a half inches below rear window and three and a half inches from center panel, bullet taking an upward course, passing through upholstery and spent against metal auto roof. It just bulged the top of the automobile roof. In other words, it was recovered between the roof and the upholstery covering of the roof.

Q. What was the point of entry of the automobile by the bullet?

A. The first entered the automobile—I just gave that to you, bullet hole in left center of metal body.

Q. Where did the bullet go that entered the front windshield, do you know?

A. No.

Q. Did you measure the size of the hole in the windshield?

A. I have here "bullet hole in left rear window approximately one and a half inches by two inches in diameter, three inches from top of window and three and a half inches from right hand side of window." That is in the rear.

Q. Is that where the bullet entered the car or where it went out?

A. No—that particular hole in the rear window ——

BY THE COURT:

Q. Was that the rear window or the side window?
A. That is the side rear of the car, the left window.
Q. The left side?
A. Yes.

MR. LIPSCHUTZ: I think he means the left side window.

BY MR. McBRIDE:

Q. Directing your attention to the hole that is shown in the front windshield of No. 10 car, this City car, tell us the size of that hole if you know.
A. I thought I had it here but I don't see it.
Q. All right. Now, let me ask you this ——
A. Oh, here it is, bullet hole passing through left hand windshield approximately in center, six inches from bottom of windshield, bullet keyholing leaving exit hole approximately one and a half inches by three-quarters of an inch. That was the measurement of the hole in the windshield window.

BY THE COURT:

Q. Wait a minute, you are talking about the windshield now?
A. Yes, the front window here.
Q. You are talking about the front window now?
A. Yes.

THE COURT: Is that what you asked him?

MR. McBRIDE: Yes, the windshield, in front.

BY MR. McBRIDE:

Q. You mean that little, round hole?
A. Yes.
Q. Was how large?
A. One and a half by three-quarters of an inch.
Q. In circumference?
A. Yes.
Q. What was the diameter, do you know, or would you have to divide that by 3.1416?
A. The reason for that apparently, it appears to me, that is my opinion, that bullet passed though the rear window, and keyholing made a larger hole in the windshield.
Q. In the windshield?
A. That is right.

BY THE COURT:

Q. That is, it came through the left rear window?
A. That is right.
Q. From the rear window on the left side?
A. Yes, in the rear of the car.
Q. Passing through the car?
A. Yes.
Q. And out through the windshield?
A. That is right.

BY MR. McBRIDE:

Q. Let me ask you this, when you speak of caliber or as a pistol being a .45 caliber, what do you mean, 45 what?
A. Hundredths of an inch.
Q. That is 45 one-hundredths of an inch?
A. That is right.

Q. Do I understand that .38 caliber is 38 one-hundredths of an inch?

A. No, it is only known as such, it is 35 hundredths, 37 and 7 one-hundredths, exactly.

Q. And a .22 is approximately what?

A. 22.

Q. How many millimeters in diameter is a .38 bullet?

A. Approximately 9, that is the way they term it.

Q. Can you tell us exactly?

A. Well, in other words, we call it a .38, and in reality, to refer to that as a .38 caliber that we refer to, we will take a foreign gun known here as a .38 and known there as a 9 millimeter, which is only .35 caliber.

Q. How many hundredths of an inch is .45 caliber?

A. A .45?

Q. Yes.

A. That is truly a .45.

Q. .45?

A. Yes.

Q. How many millimeters in diameter is a .45 bullet?

A. Well, that would be approximately 11 and a half.

Q. 11 and a half millimeters?

A. I am used to speaking in hundredths and thousandths of inches, and really it is rather confusing, millimeters, we don't use the metric system—at least I don't.

Q. I understand the metric system is used for certain foreign guns such as Lugers and Mausers, isn't that a fact?

A. Yes, a .45 is 11.4 millimeters.

Q. That is almost 11 and a half millimeters?

A. That is right.

Q. And you say that a .38 is approximately 9 millimeters?

A. It is known as such, that is right.

Q. And a .22 is how many millimeters? First, is it a true .22, or 22 one-hundredths of an inch?

A. That is right.

Q. Then is it correct to say that would be 5.6 millimeters?

A. Approximately that.

Q. Did you submit any of the bullets you had for chemical investigation to anybody?

A. Well, the chemist in our laboratory is on the same floor ——

MR. LIPSCHUTZ: I object to that.

MR. McBRIDE: I am asking him whether he submitted it to anybody.

Q. Did you send it to him?

A. I didn't send any evidence, I stayed with the evidence.

Q. Did you take, or were you present at any time when any of those bullets were examined by Dr. Lampert, the City Chemist?

A. I was.

Q. Were you?

A. Yes.

Q. Which bullet?

A. The bullet recovered in front of the store on the highway.

Q. That was given to you by Detective Ahrndt?

A. That is right.

Q. Do you know where that bullet was recovered?

A. Only what they say, in front of the Acme store.

MR. LIPSCHUTZ: Don't tell us that, do you know? Yes or no.

THE WITNESS: I don't.

Q. I am asking you this: you know it was not the one recovered in the car.

A. I know that.

Q. That one that Detective Ahrndt gave you is the one you took up with Dr. Lampert?
A. That is right.

MR. McBRIDE: That is all.

BY MR. LIPSCHUTZ:

Q. Do you know of your own knowledge the caliber of the bullet that killed Officer Ingling, do you?
A. Oh, definitely not, it had never been recovered.
Q. And of course you don't know ——

MR. McBRIDE: Wait I move that that statement that they were never recovered be stricken out.

MR. LIPSCHUTZ: That may be.

THE COURT: You never saw it?

MR. McBRIDE: I object to that.

MR. LIPSCHUTZ: I never saw it.

MR. McBRIDE: I object to that, that is a pure conclusion.

MR. LIPSCHUTZ: I will agree it can be stricken out. Will you repeat his answer?

MR. McBRIDE: What answer?

THE COURT: The one you are going to strike out? I don't know where we are now.

MR. LIPSCHUTZ: I will ask the question again.

MR. McBRIDE: Do we agree the other answer is stricken out?

MR. LIPSCHUTZ: Yes.

THE COURT: What answer is it?

MR. LIPSCHUTZ: If you will excuse me a minute, I will straighten it out. I will withdraw the previous questions and answers, and start anew.

MR. McBRIDE: Is that satisfactory?

THE COURT: Yes, except I don't know where we are in the examination now. Mr. McBride had the witness.

MR. McBRIDE: I had finished, and Mr. Lipschutz was re-examining him.

MR. LIPSCHUTZ: He told me he was finished.

THE COURT: Very well.

BY MR. LIPSCHUTZ:

Q. Do you know the caliber of the bullet that killed Officer Ingling? You can answer yes or no.
A. No.
Q. You spoke about a .45 caliber weapon that was fired; you never had possession of that weapon, did you?

MR. McBRIDE: Let me get this question.

(The question was read by the Reporter.)

A. No.

MR. McBRIDE: Do you mean inside the Acme?

MR. LIPSCHUTZ: I am to be permitted to examine him?

MR. McBRIDE: I think I should know what the question is.

MR. LIPSCHUTZ: I cannot think and be interrupted.

MR. McBRIDE: I submit most respectfully, sir, we are entitled to know which .45 he is talking about. If he means inside the Acme, I have no objection.

THE COURT: I think it is very clear. As I understand it, there was only one .45 caliber automatic produced to you.

MR. McBRIDE: That is right.

THE WITNESS: Yes.

BY THE COURT:

Q. That is the one that is before you now in evidence?
A. That is right.
Q. So if anybody talks about some other .45 it is certainly not the weapon that you came in contact with?
A. I have never seen it.
Q. You have never seen it?
A. No.

THE COURT: This is the one, the only one we know we have.

BY MR. LIPSCHUTZ:

Q. Lieutenant, is it possible to use .45 automatic ammunition in a .45 caliber revolver?

A. It is.

Q. That has been done frequently?

A. Oh, many times.

Q. You, of your own knowledge, have you any knowledge whatsoever of any caliber revolver that Smith had?

A. No. I don't know what he had even today.

Q. Have you any knowledge as to whom this revolver belonged to?

A. The only one I know of, I was informed this was taken off Hough.

Q. Never mind that. Of your own knowledge?

A. No.

MR. LIPSCHUTZ: That is all.

MR. McBRIDE: That is all.